TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904~~ 1905.

No. ~~520~~. 184.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED FEBRUARY 20, 1905.

(19,639.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 539.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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1 & 2 Please Before the Honorable the Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the 15th Day of December, 1904.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Appellant,
vs.
HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, Appellee.

Appeal from the Jefferson Circuit Court, Common Pleas Branch, Second Division.

Be it remembered that heretofore towit, on the 1st day of November 1904, the appellant by his attorney, filed in the clerk's office of the court of appeals, a transcript of the record, in words and figu-es, as follows, towit :—

3 TRANSCRIPT OF RECORD.

STATE OF KENTUCKY, County of Jefferson.

Pleas before the Honorable Sam'l B. Kirby, Judge of the Jefferson Circuit Court, Chancery Branch, Second Division, at the Court House, on the Dates Hereinafter Mentioned.

Jefferson Circuit Court, Second Chancery Division.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, Connecticut,
vs.
HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky.
Transcript of Record.

Be it remembered, that heretofore, to-wit, on October 10, 1904, came the plaintiff and filed its verified petition in the office of the clerk of the aforesaid court, which said petition is in words and figures as follows, to-wit :

4 Jefferson Circuit Court.

THE TRAVELERS INSURANCE COMPANY OF Hartford, Connecticut, Plaintiff,
vs.
HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, Defendant.
No. 38367. Petition in Equity.

Plaintiff states that it is a corporation created by and organized under and pursuant to the laws of the State of Connecticut with

usual corporate powers and empowered to transact the business of insurance in said State and elsewhere, and has for many years transacted said business of insurance in the State of Kentucky under the authority of the commissioner of insurance of the State of Kentucky, and that the defendant, Henry R. Prewitt is now and has for years last past been insurance commissioner of the State of Kentucky.

Plaintiff states that before transacting said insurance business in Kentucky it returned to said commissioner of insurance a copy of its charter or articles of association, made deposit of and has since maintained the capital or reserve required by the said commissioner and by the insurance department of the State of Kentucky, has filed with the said commissioner a resolution adopted by its board of directors consenting that the service of process upon any of its agents in this State or upon the commissioner of insurance of this
5 State in any action brought or pending in this State should be valid service upon plaintiff, and in every other respect has always fully complied with the laws of the State of Kentucky.

Plaintiff further states that on or about the 1st day of July, 1904, the defendant granted to plaintiff the authority to transact the insurance business aforesaid in the State of Kentucky for a period of one year thence next ensuing and issued to all of plaintiff's agents licenses to transact said business, and that said authority and other licenses are still in force and effect and that plaintiff's said agents are now transacting said business of insurance.

Plaintiff states that all the things aforesaid are well known to defendant and recognized by defendant and that notwithstanding the laws aforesaid defendant has notified plaintiff that he has on file a complaint that plaintiff has removed a case from the Jefferson circuit court to the circuit court of the United States for the western district of Kentucky and for that reason alone defendant threatens to revoke the authority of plaintiff to transact insurance business in Kentucky and to revoke the licenses issued to plaintiff's agents.

That said communication from defendant refers to a certain action No. 37160 instituted against the plaintiff in the Jefferson circuit court by Abram Frankel and others, wherein plaintiff filed its petition and bond for removal within twenty days after the institution of said action. That the said commissioner has not yet revoked the authority of plaintiff to transact business in Kentucky, nor revoked the licenses issued to plaintiff's agents as the plaintiff has not yet filed a transcript of the record in said case in the United States circuit court aforesaid. Plaintiff says that under the laws of the United States it is required to file the said record in the said circuit court of the United States on the first day of its session which begins on this the tenth of October, 1904, and that said defendant threatens to and unless enjoined by this court
6 will revoke the authority of plaintiff to do business in the State of Kentucky and revoke the licenses of its agents to transact said business in Kentucky, notwithstanding plaintiff's compliance with the provisions of the laws of the State of Kentucky

because and solely because of the plaintiff's filing in said circuit court of the United States said transcript and perfecting the removal of the case aforesaid from the said Jefferson circuit court.

Plaintiff states that its right to remove the said action from the Jefferson circuit court to the said United States circuit court is a right guaranteed to plaintiff by the Constitution and laws of the United States, and that any law of any State to the contrary would be null and void, and that the revocation of plaintiff's authority to transact business and of the licenses to its agents to transact business in Kentucky would deprive the plaintiff of a right guaranteed to it by the Constitution and laws of the United States and deprive the plaintiff of the equal protection of the laws and constitute a violation and infraction of plaintiff's rights guaranteed to it by the Constitution of the United States and by the act of Congress in such cases made and provided. The plaintiff invokes the protection of the said United States Constitution and laws.

Plaintiff further states that its business in Kentucky is worth many thousands — dollars to plaintiff and that revocation of its authority to transact business of insurance and of the licenses issued to its agents as aforesaid would produce great and irreparable injury and damage to plaintiff irremediable by any action at law, but remediable only in equity.

Plaintiff states that neither the restraining order nor the injunction herein prayed for has been asked of or refused by any court or other officer.

Wherefore plaintiff prays that defendant, Henry R. Prewitt,
7 insurance commissioner of the State of Kentucky, be enjoined and restrained from revoking plaintiff's authority to transact the business of insurance in the State of Kentucky and from revoking the licenses issued to plaintiff's agents and from refusing to issue licenses to other agents whom plaintiff may appoint, and from refusing to renew at expiration thereof plaintiff's said authority and said licenses issued to plaintiff's agents so long as plaintiff complies with the provisions of the laws of the State of Kentucky in force in said State, plaintiff prays for a temporary restraining order, for a preliminary or interlocutory injunction, for a perpetuation of such injunction upon final hearing of its petition, for plaintiff's costs herein incurred and all general and proper relief.

PIRTLE, TRABUE, DOOLAN & COX,
Attorneys for Plaintiff.

R. M. Ferguson states that he is the principal officer and agent of the plaintiff, The Travelers' Insurance Company of Hartford, Connecticut, in this county and State at this time, and that the statements contained in the foregoing petition are true as he verily believes.

R. M. FERGUSON.

Subscribed and sworn to before me by R. M. Ferguson this 10th day of October, 1904. My commission expires February 15, 1908.

V. C. YEAGER,
Notary Public, Jefferson County, Ky.

At a court held October 29, 1904:

It appearing that on October 11, 1904, the defendant, Henry R. Prewitt, filed herein his demurrer to the petition and that said demurrer was marked filed by the clerk, and was argued orally
8 before the court and briefed, and the cause submitted, but no order was entered upon the order book.

It is now ordered by consent that said demurrer be and the same hereby is filed and the cause submitted *nunc pro tunc* as of October 11, 1904.

Said demurrer is in words and figures as follows, to-wit:

Jefferson Circuit Court.

THE TRAVELERS INSURANCE COMPANY, Plaintiff, *vs.* HENRY R. PREWITT, Defendant. } No. 38367. Demurrer.

The defendant demurs to the petition herein because it does not state facts sufficient to constitute a cause of action against him.

H. R. PREWITT, Com'r.

At a court held October 29, 1904:

This cause having been submitted upon the defendant's demurrer to the petition and the court being advised delivered an opinion which is filed herewith and made a part of the record.

It is thereupon ordered that said demurrer be and the same hereby is sustained, to which the plaintiff objected and excepted.

The said opinion is in words and figures as follows, to-wit:

9 Jefferson Circuit Court, Chancery Branch, Second Division.

THE TRAVELERS INSURANCE COMPANY OF Hartford, Connecticut, Plaintiff, *vs.* HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, Defendant. } No. 38367. Opinion.

The plaintiff is a foreign corporation, organized under the laws of the State of Connecticut, with power to transact the business of insurance. It has complied with the laws of the State of Kentucky,

and was, on July 1, 1904, granted authority to transact the business of insurance in Kentucky, for a period of one year.

It is alleged in the petition that the plaintiff has removed a certain cause from a State court to the circuit court of the United States for the western district of Kentucky, and for that reason alone, the defendant, who is the insurance commissioner of Kentucky, threatens to revoke the authority of plaintiff to transact the business of insurance in Kentucky, and to revoke the license issued to plaintiff's agents.

An injunction is prayed to restrain the insurance commissioner from revoking the license, upon the ground that section 631 of the Kentucky Statutes is in conflict with the Constitution of the United States, and the laws passed pursuant thereto, and is, therefore, void.

10 The language of the statute is as follows:

"Before authority is granted to any foreign insurance company to do business in this State, it must file with the commissioner a resolution, adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the commissioner of insurance in this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the commissioner it shall be his duty to at once send it by mail addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it, in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the commissioner to forthwith revoke the authority of such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in the State."

A temporary restraining order was issued by this court and the question arises upon the demurrer to the petition and upon plaintiff's motion for a temporary injunction.

The general rights of the State to admit or exclude foreign corporations, not engaged in interstate commerce, or otherwise protected by the Federal law, are too well understood and too firmly established for discussion here.

Paul *v.* Virginia, 8 Wall., 168;
Ducat *v.* Chicago, 10 Wall., 410;
Lafayette Ins. Co. *v.* French, 18 How., 404, and numerous other authorities.

11 In Doyle *v.* Continental Insurance Company, 94 U. S. page 540, the court said:

"The cases of Bank of Augusta *v.* Earle, Ducat *v.* Chicago, Paul *v.* Virginia and Lafayette Insurance Co. *v.* French, establish the principle that a State may impose upon a foreign corporation, as a

condition of coming into or doing business within its territory, any terms, conditions and restrictions, it may think proper, that are not repugnant to the Constitution or laws of the United States. The point is elaborated at great length by Chief Justice Taney in the case first named, and by Mr. Justice Field in the case last named.

"The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a State is always revocable. Rector *v.* Philadelphia, 24 How., 300; People *v.* Roper, 55 N. Y., 629; People *v.* Commissioners, 47 N. Y., 50. The power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect. Humphrey *v.* Pegues, 16 Wall., 244; Tomlinson *v.* Jessup, 15 *id.*, 454.

"A license to a foreign corporation to enter a State does not involve a permanent right to remain, subject to the laws and Constitution of the United States. Full power and control over its territories, its citizens, and its business belong to the State.

"If the State has the power to do an act, its intention or the reason by which it is influenced in doing it can not be inquired into. Thus, the pleading before us alleges that the permission of the Continental Insurance Company to transact its business in Wisconsin, is about to be revoked, for the reason that it removed the case of Drake from the State to the Federal courts.

"If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever
12 may be the result, it can not be impeached. The acts of a State are subject to still less inquiry, either as to the act itself or as to the reason for it. The State of Wisconsin, except so far as its connection with the Constitution and laws of the United States alters its position, is a sovereign State, possessing all the powers of the most absolute government in the world."

This case (Doyle *v.* Ins. Co.), was an action identical in every detail with the one at bar.

"The statute of Wisconsin declares that if a foreign insurance company shall remove any case from its State court into the Federal court, contrary to the provisions of the act of 1870, it shall be the duty of the Secretary of State immediately to cancel its license to do business within the State. If the State has the power to cancel the license, it has the power to judge of the cases in which the cancellation shall be made. It has the power to determine for what causes and in what manner the revocation shall be made."

It is urged that this case was overruled by the subsequent case of Barron *v.* Burnside, 121 U. S., p. 186. An examination of that case will show that the court did not withdraw that opinion, or overrule the case, but simply distinguished the case then under consideration from the former one, and announced its adherence to the former ruling in the following language:

"The case of Doyle *v.* Continental Insurance Company, 94 U. S., 535, is relied on by the defendant in error. In that case this court said that it had carefully reviewed its decision in Insurance Co. *v.* Morse,

and was satisfied with it. In referring to the second conclu-
13 sion in Insurance Co. *v.* Morse, above recited, namely, that the statute of Wisconsin was repugnant to the Constitution of the United States, and was illegal and void, the court said in Doyle *v.* Continental Insurance Co., that it referred to that portion of the statute which required a stipulation not to transfer causes to the court of the United States. In that case, which arose under the same statute of Wisconsin, the foreign insurance company had complied with the statute, and had filed an agreement not to remove suits into the Federal courts, and had received a license to do business in the State. Afterwards, it removed into the Federal court a suit brought against it in a State court of Wisconsin. The State authorities threatening to revoke the license, the company filed a bill in the circuit court of the United States, praying for an injunction to restrain the revoking of the license. A temporary injunction was granted. The defendant demurred to the bill, the demurrer was overruled, a decree was entered making the injunction perpetual, and the defendant appealed to this court. This court reversed the decree and dismissed the bill. The point of the decision seems to have been, that, as the State had granted the license its officers would not be restrained by injunction by a court of the United States from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in Insurance Co. *v.* Morse, must be regarded as not in judgment."

An examination of the statement of facts in Barron *v.* Burnside, shows that it grew out of the arrest and incarceration of a railroad locomotive engineer, employed by a "foreign corporation," which had not taken out a license or otherwise complied with the statutory requirements of the State of Wisconsin. The statute is quoted
in full, and by its terms imposes a fine of one hundred dol-
14 lars. The question arose upon a trial of a writ of *habeas corpus*. Attention is called to the facts in that case, because, after all, as said by the Supreme Court of the United States, an opinion must be considered in the light of the facts recited. The facts in that case differ materially from the facts in the case of Doyle *v.* Continental Insurance Company. That the latter case has not been overruled, or the principles announced therein abandoned, is shown by the fact that the Supreme Court of the United States has frequently since referred to that case as an authority. (142 U. S., 545; 144 U. S., 236; 175 U. S., 146.) Also, see Rose's notes, vol. 9.

If the Supreme Court had intended to overrule the Doyle case, it could have easily said so. Instead of that it said:

"The point of the decision (Doyle *v.* Ins. Co.), seems to have been that, as the State had granted the license, its officers would not be restrained by injunction by a court of the United States from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the ad-

judication in Insurance Co. *v.* Morse, must be regarded as not in judgment."

In other words, it approved the ruling that an injunction would not be granted to restrain an officer of the State from revoking a license to a foreign insurance company.

It has been urged by counsel for plaintiff that the court of appeals of Kentucky, in the case of Commonwealth *v.* East Tennessee Coal Company, 97 Ky., 238, having held section 572 of the Kentucky Statutes in conflict with the Constitution of the United States, that it must follow, for the reasons announced in that opinion, that section 631, now under consideration, must also be held unconstitutional and void.

15 The action referred to was brought by the Commonwealth of Kentucky against the Tennessee corporation, for the purpose of having it judicially declared that the corporation had forfeited its right to carry on business in Kentucky and to enjoin it from continuing to do business. That case, and the case of Commonwealth *v.* Jellico Coal Company, reported in the same volume, page 246, were heard and decided at the same time.

It will be seen upon an examination of the statute considered in the two cases above mentioned that it provided that "if any foreign corporation, without the consent of the adverse party, removes to the Federal court, any action pending against it in any court of this State, etc., such action on the part of the corporation shall forfeit its right to transact or carry on any business in this State; and such corporation or any officer, etc., who shall thereafter transact or engage in any business or employment for such corporation in this State, shall be severally guilty of a *misdemeanor*, etc., and be fined for each offense, not less than five hundred nor more than one thousand dollars."

The case of The Commonwealth *v.* The Jellico Coal Company was an action by the Commonwealth to recover from the defendant corporation the sum of one thousand dollars as a fine or penalty.

The court of appeals of Kentucky carefully reviewed the authorities, particularly Doyle *v.* Continental Insurance Company and Barron *v.* Burnside, and followed the ruling of the Supreme Court in the case of Insurance Co. *v.* Morse, 20 Wall., 445, properly holding that section of the Kentucky Statutes unconstitutional and void, because it attempted to abridge the constitutional right of a citizen to remove a controversy to the Federal court.

16 The two Kentucky cases above mentioned were materially different from the case at bar, and the statute there considered materially different from the statute now under consideration. The principles of law of one therefore do not apply to the other.

Section 631, Kentucky Statutes, first regulates the granting of authority to foreign insurance companies to do business in this State, requiring them to file with the insurance commissioner a resolution adopted by the board of directors, consenting to service of process

upon the insurance commissioner of this State, and it regulates the duty of the insurance commissioner respecting such insurance companies, should they remove a cause from a State court to a Federal court, requiring him in such case to revoke the license of such insurance company.

It will be seen from an examination of this act that no penalty or fine is imposed upon an insurance company, but the State legislature, exercising its right to regulate the admission or exclusion of foreign insurance companies, has directed its agent, the insurance commissioner, to execute its wish or purpose.

It has been held by the Supreme Court:

"If the State has the power to do an act, its intention or the reason by which it is influenced in doing it, can not be inquired into."

"If the act of the individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it can not be impeached. The acts of a State are subject to still less inquiry, either as to the act itself, or as to the reason for it."

17 It must be admitted that under the authority of Barron *v.* Burnside, the penalty provided in section 572 could not be recovered, and that section was, in the opinion rendered in the case of Commonwealth *v.* Jellico Coal Company, properly held to be unconstitutional. As it was unconstitutional the injunction proceeding (Commonwealth *v.* East Tennessee Coal Company) based upon the same section of the statute and decided at the same time, was properly dismissed. But, the section now under consideration and the rights of the parties arising thereunder have never been passed upon by the court of appeals of Kentucky.

As said above, the case at bar is similar in every respect to the case of Doyle *v.* Continental Insurance Company, differing from it only in the fact that the proceeding was instituted in a State court instead of a Federal court, and if, as held by the Supreme Court of the United States," that as the State had granted the license, its officers would not be restrained by injunction by a court of the United States from withdrawing it," it follows that a State court under like circumstances cannot enjoin. The quotation above is from the review of the Doyle case in the opinion in Barron *v.* Burnside.

It will be remembered that no question of practice or of jurisdiction was raised. In the case above referred to, the proceeding was instituted by a foreign corporation in the Federal court, and the court unquestionably had jurisdiction. The words, therefore, in the opinion "by a court of the United States," is simply surplusage.

The motion for a temporary injunction is overruled and the demurrer to the petition is sustained, with exceptions.

SAM'L B. KIRBY, Judge.

18 At a court held October 29, 1904:

The plaintiff Travelers' Insurance Company of Hartford, Conn., declined to plead further, and the court being advised,

It is now ordered, adjudged and decreed, that the petition be and the same hereby is dismissed and that the defendant recover his costs and for the same may have execution to which the plaintiff excepted and prayed an appeal to the court of appeals which is granted.

STATE OF KENTUCKY,
County of Jefferson.

I, W. L. Weller, Jr., clerk of the Jefferson circuit court in and for the county and State aforesaid, do hereby certify that the foregoing transcript contains a true and complete copy of the record according to the truth in the case wherein The Travelers Insurance Company, of Hartford, Conn., is plaintiff and Henry R. Prewitt, insurance commissioner, of the State of Kentucky, is defendant, a cause lately pending in the aforesaid court, chancery branch, second division, No. 38367, as the same appears of record and now on file in my office.

Witness my hand this 31st day of October, 1904.

W. L. WELLER, JR.,
Clerk Jefferson Circuit Court.

19 With the foregoing transcript the appellant filed a statement in the office of the clerk of the court of appeals, in words and figu-es as follows:—

20 In the Court of Appeals of the State of Kentucky, September Term, 1904.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Appellant,
versus
HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, Appellee.

Appeal from the Jefferson Circuit Court, Chancery Branch, 2nd Division.

Transcript of Record.

The judgment appealed from was rendered on October 29, 1904, and may be found on page 19 of the record. No summons is to issue.

PIRTLE, TRABUE, DOOLAN & COX,
Counsel of Appellant.

WM. BRO. SMITH, Of Counsel.

21 Be it remembered that on the 2nd day of December 1904 in the court of appeals at the capitol at Frankfort, the following order was entered towit:—

THE TRAVELERS INSURANCE CO. *vs.* PREWITT, Commissioner. } Jefferson.

Came parties by counsel and on motion said cases are ordered docketed, and advanced, and same coming on for hearing were argued by E. F. Trabue for appellant Travelers Insurance Company and by J. H. Hazelrigg for H. R. Prewitt insurance commissioner, and submitted.

And afterwards on the 15th day of December, 1904 at a court of appeals the following judgment was entered towit:—

TRAVELERS INSURANCE COMPANY, Appellant, *vs.* HENRY R. PREWITT, Insurance Company, Appellee. } Appeal from Jefferson Circuit Court, Chancery Branch, 2nd Division.

The court being sufficiently advised it seems to them there is no error, in the judgment herein—

It is therefore considered that said judgment be affirmed which is ordered certified to said court (whole court sitting, Chief Justice Burnam, and Judge Barker dissenting).

It is further considered that the appellee recover of appellant his cost herein expended.

On said day the following opinion was delivered in said case towit:

22 Court of Appeals of Kentucky, December 15th, 1904.

(To be Reported.)

HENRY R. PREWITT, Commissioner, Appellant, *vs.* SECURITY MUTUAL LIFE INS. CO., Appellee.	Appeal from Jefferson Circuit Court (Ch'y (2nd) Div.).
THE TRAVELERS INS. CO., Appellant, *vs.* HENRY R. PREWITT, Commissioner, Appellee.	Appeal from Jefferson Circuit Court (Ch'y (2nd) Div.).

Opinion of the Court by Judge Hobson.

In the first of the above cases the Security Mutual Life Insurance Company filed its petition in equity alleging that in the year 1900 it began business in Kentucky having complied with the requirements of the statutes of the State applicable to foreign insurance companies, the plaintiff being a corporation organized under the laws of the State of New York; that the commissioner then granted it permission to transact the business of life insurance in this State, and
23 it employed a large number of agents, established a large number of agencies throughout the State, expended large sums of money in advertising its business and acquired a large and profitable business in the State; that in June, 1904, it removed to the circuit court of the United States for the eastern district of Kentucky without the consent of the other party a suit brought against it in one of the circuit courts of the State, and that on September 29, 1904, the defendant Prewitt, as insurance commissioner, revoked its authority to do business in the State for the sole reason that it had removed the suit referred to to the circuit court of the United States and refused, and still refuses, to set aside the revocation. It prayed an injunction requiring the commissioner to annul the revocation of its license and to continue its authority to transact the business of life insurance in the State. The defendant demurred to the petition, his demurrer was overruled, and he declining to plead further, a judgment was entered as prayed in the petition.

24 In the other case the petition is very similar, except that it is there averred that the commissioner has not yet revoked the plaintiff's license, but that he threatens to do so, and unless enjoined by the court will revoke it, to the plaintiff's irreparable injury, it being a foreign corporation created under the laws of the State of Connecticut. The defendant demurred to the petition; his demurrer was sustained, and the plaintiff declining to plead furthe,

its petition was dismissed. Both the appeals raise the same questions, and will be considered together.

By section 633, Ky. Stat., licenses to agents of foreign companies must be renewed annually, and any person acting as the agent of such a company without procuring a license, or after the license has expired, or has been suspended or revoked, shall be guilty of a misdemeanor, and fined not less than $50.00 nor more that $100.00 for each offense. By section 634 every foreign insurance company before transacting any business in this State must return to the commissioner a copy of its charter or organic law, and the commissioner upon being satisfied that the company has complied with the
25 laws of the State and is possessed with the legal reserve, shall furnish to such agents as the company directs a license to transact business as agents for the company, under the seal of the insurance department. By section 657, foreign life insurance companies in addition must file statements annually of their condition on the 31st of December of the year preceding, and certain evidences of their deposits, securities, &c. By section 694, insurance companies other than life not incorporated under the laws of this State, upon complying with the provisions of the statute, may be authorized by the commissioner to transact business in the State. By section 761 the fees to be charged by the commissioner are regulated. Section 631, Ky. Stat., is in these words:

"Before authority is granted to any foreign insurance company to do business in this State, it must file with the commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the commissioner of insurance of this State, in any action brought or pending in this State, shall be a valid service upon said com-
26 pany; and if process is served upon the commissioner, it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this State; and to publish such revocation in some newspaper of general circulation published in the State."

The validity of the latter clause of the section is the only question to be determined upon the appeal. It is insisted that it is in conflict with the Constitution of the United States. Three decisions of the United States Supreme Court are relied on. In Home Insurance Company *v.* Morse, 20 Wall., 445, the statute of the State required the foreign insurance company to sign an agreement not to remove any of its cases to the Federal courts. The company signed the agreement and afterwards filed a petition seeking the removal of a

suit brought against it to the Federal court. The State court
27 refused to remove the case, but on appeal to the United States Supreme Court the judgment of the State court was reversed and it was held that the agreement in advance not to exercise a right guaranteed by the Constitution did not prevent the defendant from removing the case to the Federal court. The opinion was written by Judge Hunt, and goes no further than the question actually before the court.

The next case relied on is Doyle *v.* Continental Insurance Company, 4 Otto, 535, the opinion being also written by Judge Hunt. In that case there was a State statute corresponding to section 631 above quoted, and the State officer under it was about to cancel the license of the insurance company. The plaintiff made in substance the same allegations as are made in the cases before us, and prayed an injunction as in these cases. The Supreme Court reversing the court below, dismissed the bill. After distinguishing the case from the Morse case, the court said:

"The cases of Bank *v.* Earle (13 Pet., 519), Ducat *v.* Chicago
28 (10 Wall., 410), Paul *v.* Va. (8 Wall., 168), and Insurance Company *v.* French (18 How., 404), establish the principle that a State may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions and restrictions it may think proper, that are not repugnant to the Constitution or laws of the United States. The point is elaborated at great length by Chief Justice Taney in the case first named, and by Mr. Justice Field (Curtis) in the case last named.

"The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a State is always revocable. (Rector *v.* Philadelphia, 24 How., 300; People *v.* Roper, 35 N. Y., 629; People *v.* Commissioners, 47 N. Y., 501.) The power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect. (Humphrey *v.* Pegues, 16 Wall., 244; Tomlinson *v.* Jessup, 15 Wall., 454.)

"License to a foreign corporation to enter a State does not involve a permanent right to remain, subject to the laws and Constitution of the United States. Full power and control over its territories, its citizens and its business belongs to the State.

"If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired
29 into. Thus, the pleading before us alleges that the permission of the Continental Insurance Company to transact its business in Wisconsin is about to be revoked, for the reason that it removed the case of Drake from the State to the Federal courts.

"If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached. The acts of a State are subject to still less inquiry, either as to the act itself, or as to the reason for it.

The State of Wisconsin (except so far as its connection with the Constitution and laws of the United States alters its position) is a sovereign State, possessing all the powers of the most absolute government in the world.

"The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding, which is not the subject of inquiry in determining the validity of a statute. An unconstitutional reason or intention is un impracticable suggestion, which cannot be applied to the affairs of life. If the act done by the State is legal, is not in violation of the Constitution or laws of the United States, it is quite out of the power of any court to inquire what was the intention of those who enacted the law.

"In all cases where the litigation of a State has been declared void, such legislation has been based upon an act or a fact which was itself illegal."

30 After discussing certain previous decisions, the court added:

"It is said that we thus indirectly sanction what we condemn when presented directly, to-wit: that we enable the State of Wisconsin to enforce an agreement to abstain from the Federal courts. This is an 'inexact statement.' The effect of our decision in this respect is that the State may compel the foreign company to abstain from the Federal courts, or to cease to do business in the State. It gives the company the option. This is justifiable because the complainant has no constitutional right to do business in that State; that State has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and, without reference to the injustice, the prejudice or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or Constitution of the United States, by its exclusion from the State, is infringed; and this is what the State now accomplishes. There is nothing, therefore, that will justify the interference of this court."

It is conceded by counsel that if this case is still authority, these actions must fail. But it is insisted that in Barron *v.* Burn-

31 side, 121 U. S., 186, this case was, in effect, overruled. In Barron *v.* Burnside, there was a State statute requiring every foreign corporation to have a license before engaging in business in the State. The license, by the terms of the statute, was not to be issued, except upon the application of the company by a resolution of the board of directors or stock holders authorizing it, and containing a stipulation that the permit should be subject to each of the provisions of the act, one of which was that the permit should be void if the corporation removed a case to the Federal courts. Barron was arrested under the statute for doing business for a foreign corporation without complying with the statute and obtained a writ of *habeas corpus*, which was sustained by the United States

Supreme Court. The court, after quoting the statute, and discussing it at some length, said:

"This proceeding is a unit. The filing of the articles of incorporation and the provision in regard to service of process are to be authorized by the same resolution which requests the issue of the permit; and this request or application is to contain the stipulation above mentioned. These various things are not separable."

32 Then after some further discussion of the statute, the court concludes with these words:

"In view of these considerations, the case falls directly within the decision of this court in Home Insurance Company *v.* Morse."

It then proceeds, after showing what was decided in the Morse case, to discuss the Doyle case in these words:

"The case of Doyle *v.* Continental Insurance Company, 94 U. S., 535, is relied on by the defendant in error. In that case this court said that it had carefully reviewed its decision in Home Insurance Company *v.* Morse, and was satisfied with it. In referring to the second conclusion in Insurance Company *v.* Morse, above recited, namely, that the statute of Wisconsin was repugnant to the Constitution of the United States, and was illegal and void, the court said, in Doyle *v.* Continental Insurance Company, that it referred to that portion of the statute which required a stipulation not to transfer causes to the courts of the United States. In that case, which arose under the statute of Wisconsin, the foreign insurance company had complied with the statute, and had filed an agreement not to remove suits into the Federal courts, and had received a license

33 to do business in the State. Afterwards, it removed into the Federal court a suit brought against it in a State court of Wisconsin. The State authorities threatening to revoke the license, the company filed a bill in the circuit court of the United States, praying for an injunction to restrain the revoking of the license. A temporary injunction was granted. The defendant demurred to the bill, the demurrer was overruled, a decree was entered making the injunction perpetual, and the defendant appealed to this court. This court reversed the decree, and dismissed the bill. The point of the decision seems to have been that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in Insurance Company *v.* Morse (*supra*), must be regarded as not in judgment."

We do not understand this to overrule the Doyle case, for certainly if the State cannot withdraw the license it has once granted, any court of competent jurisdiction may so decide. If the State statute withdrawing the license was unconstitutional and void, the Supreme Court of the United States had the same power to

34 declare the statute in that case unconstitutional as it had to declare the statute unconstitutional in Barron *v.* Burnside.

Our statute is not liable to the objections made to the statute in either the Morse case or the Barron case. Under our statute the foreign insurance company is at liberty to remove its cause to the Federal court whenever it sees proper. It is required to sign no stipulation or agreement interfering with that right. The regulation is reasonable that the State for the protection of its citizens against unsafe insurance companies should require them before doing business in the State to obtain a license from the insurance commissioner, and to furnish him such evidence of their solvency as will protect insurers in this State, before he is authorized to grant them a license. The license which the State grants is purely a matter of grace, and like any other license may be revoked by the licensor at pleasure. The revocation of the license interferes with no legal right of the licensee; for when he takes it he takes
35 it subject to revocation. He cannot question the reason of the licensor for revoking the license, as the State may exclude foreign corporations from doing business in the State, with or without reason. If I have license to cross my neighbor's lot and he revokes it because I brought a suit against his son, I cannot enjoin him from revoking the license on the ground that I had a constitutional right to go to the courts for relief, and that my exercise of a constitutional right was no just reason for his revoking the license he had given me; for he had an absolute right to revoke the license and the fact that he did it out spite or for a bad reason is immaterial. The State, by her statutes above referred to, in effect, says to the foreign insurance companies, "I will license you to do business here on the same plane as domestic corporations, and if you come here you must stand on no more favorable ground than the domestic insurance companies. If after you come, you refuse to so stand, I will withdraw my license." The reason for the statute is not distrust of the Federal courts, but the
36 practical denial of justice that results in a sparsely settled State like ours, if the case must be tried one or two hundred miles from where the parties and witnesses reside. Domestic insurance companies enjoy no such immunity, but must try their cases in the vicinage; the State simply says to the foreign insurance companies, "I will withdraw my license if you insist on privileges not enjoyed by home companies." If the State on the day before these suits were filed by legislative act had withdrawn all licenses to foreign insurance companies, reciting in the preamble to the act that it was enacted inasmuch as the two cases above referred to had been removed to the United States circuit court, could these plaintiffs have complained? If not, how are they affected by the fact that the State acts by an executive officer, and not by a special statute? Certainly they cannot complain that the license of certain other companies was not revoked.

The case of Commonwealth *v.* East Tennessee Coal Company, 97 Ky., 238, did not involve the revocation of a license
36½ granted by the State, but was in effect similar to Barron *v.* Burnside, above cited, being a proceeding to impose a fine on

the defendant after it removed a case from the State courts. The naked question presented here is, may the State, without cause, revoke a license it has once granted; for a bad reason is no worse than none at all. The distinction is a narrow one, but none the less sound; unless the whole doctrine that the State may grant or withhold a license as it sees fit is to be abandoned. It is juggling with words to say that a State may at will prohibit foreign corporations from doing business in t... State (Hooper *v.* California, 155 U. S., 650), and yet that it may not at will withdraw a license which it has once granted to such corporations.

It seems to us that the Boyle case rests on sound principles, and that the Barron case in no wise conflicts with it; for that case is by the court expressly put upon the ground that the statute there, when
properly construed, fell within the rule laid down in the
37 Morse case. (6 Thompson on Corporations, sections 7466-67; 13 Am. & Eng. Ency. of Law, page 867; People *v.* Pavey, 151 Ill., 101.)

The judgment in the first case is therefore reversed and cause remanded to lower court with instructions to dismiss petition.

The judgment in the second case is affirmed.
Whole court sitting.

Chief Justice Burnam & Judge Barker dissenting.
N. B. Hays, att'y gen'l, J. H. Hazelrigg, for ins. com'r.
Wm. Marshall Bullitt, F. W. Jenkins, for Security Mut. Life Ins. Co.
Pirtle, Trabue, Doolan & Cox, Wm. Bro. Smith, for Travelers Insurance Company.

[Stamped:] W. G. Baxter, official copyist court of appeals Kentucky.

38 And afterwards on the 19th day of January 1905, at a court of appeals at the capitol at Frankfort, the following order was entered to wit:—

THE TRAVE-RS' INS. CO. *vs.* PREWITT, Commissioner. } Jefferson.

Judge Barker delivered a dissenting opinion herein.
39 The said dissenting opinion being in words and figures as follows:

40 Court of Appeals of Kentucky, January 19, 1905.

HENRY R. PREWITT, Commissioner, Appellant,
vs.
SECURITY MUTUAL LIFE INSURANCE COMPANY, Appellee.

THE TRAVELERS' INSURANCE COMPANY, Appellant,
vs.
HENRY R. PREWITT, Commissioner, Appellee.

Dissenting Opinion by Judge Barker.

Believing that the conclusion reached by the majority of the court in these cases cannot be justified either by reason or upon authority, I feel it my duty to present my views in a dissenting opinion. I do this with great modesty, and with great reluctance: the first from solicitude lest I fail to do justice to the importance of the subject, and the second from my disinclination to differ from the opinions of those whose attainments I hold in so high esteem.

41 The question presented by these records is whether a State may enact a valid law, which shall present to a foreign corporation the alternative either of surrendering its right, under the provisions of the Constitution and laws of the United States, to remove to the Federal court an action instituted against it by a citizen in the State court, or of not being permitted to do business in the State. The proper solution of this question is essential to the orderly adjustment of the conflicting spheres of our dual system of jurisprudence—national and State.

When our complex form of government was established, the national Constitution and the laws enacted in pursuance thereto, were made the supreme law of the land (U. S. Constitution, art. 6;) and it must necessarily follow, as a logical and legal sequence, that, whenever a State law comes in conflict with a national law, the former must give way—it is void. The statutes of the United States, in pursuance of a settled national policy of affording to citizens of each State the means of escaping the dangers of local prejudice in favor of home litigants, prescribe the conditions and terms

42 under which such actions may be removed to the Federal courts. This is done in the interest of fair and impartial trials, or, in other words, in the interest of justice.

The laws of our Commonwealth bearing upon the question under investigation are divided into two branches, although the intent of each is the same; the divergence being merely in the particular manner of enforcing the same principle against different classes of corporations. Sections 572 and 573 of the Kentucky statutes apply to all foreign corporations doing business in the State, except insurance companies, and are as follows:

SECTION 572. "If any foreign corporation shall, without the con-

sent of the adverse party, remove to a Federal court any action pending against it in any court of this State, or institute an action against a citizen of this State in a Federal court of this State, such action on the part of the corporation shall forfeit its right to transact or carry on any business in this State; and such corporation, and any officer, agent or employé thereof, who shall thereafter transact or engage in any business or employment for such corporation in this State shall be severally guilty of a misdemeanor, and, upon indictment and conviction in the circuit court of any county in which such corporation, or any officer, agent or employé thereof transacts or engages in any business, be fined for each offense
43 not less than five hundred nor more than one thousand dollars."

SECTION 573. "The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897; and if the officers, managers or agents of such corporation shall, after said date, exercise any powers, privileges or immunities repealed by this section or inconsistent with the provisions of this chapter, relating to similar corporations, or which could not be obtained under this chapter, the officer, manager or agent so offending, and the corporation for which he acts, shall each be guilty of a misdemeanor, and fined for each offense not less than one hundred nor more than one thousand dollars, and upon the conviction of the corporation, the the trial jury may, at their discretion, direct the forfeiture of its charter or articles of incorporation, in which case the court shall so adjudge. After the twenty-eighth day of September, 1897, the provisions of this chapter shall apply to all corporations created or organized under the laws of this State, if said provisions would be applicable to them if organized under this chapter."

The statute applicable to foreign insurance corporations, is to be found in sections 631 and 633 of the Kentucky statutes, and
44 is as follows:

SECTION 631. "Before authority is granted to any foreign insurance company to do business in this State, it must file with the commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the commissioner of insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding

to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in the State."

SECTION 633. "Licenses to agents of foreign companies must be renewed annually in the same manner as original licenses, upon a finding by the commissioner that the company represented by the agent has fully complied with the law, and maintains its required capitol or reserve; and whoever solicits and receives application for insurance on behalf of any insurance company, or transmits for any person other than himself an application for insurance, or a policy of insurance to or from such company, or advertises that he
45 will receive or transmit the same, or who shall in any manner, directly or indirectly, aid or assist in transacting the insurance business of any insurance company, shall be held to be an agent of such company within the meaning of this article, anything in the policy or application to the contrary notwithstanding; and any person acting as the agent of any company within the meaning of this section, without first procuring and having a license from the commissioner to act as such agent, or, after such license has expired, been suspended or revoked, or who shall procure any premium or obligation therefor by fraudulent representations, shall be deemed and held to be guilty of a misdemeanor, and, upon conviction for such offense, shall be fined not less than fifty nor more than one hundred dollars for each offense."

The question involved here was presented for adjudication in this State for the first time in Commonwealth *v.* East Tennessee Coal Co., 97 Ky. 238, and Commonwealth *v.* Jellico Coal Co., *id.* 246. These cases arose under section 572 of the Kentucky statutes, the two corporations, as their names import, being coal companies. The opinions in both were delivered by the court through Judge Eastin, and contain a learned and thorough discussion of the question at bar. In both, section 572, which, as said before, applies to foreign corporations (except insurance) doing busi-
46 ness in the State, was held to be void, because in contravention of the Constitution and the laws of the United States. These cases are both practically overruled by the opinion of the majority, although this has not been done in express language; the court, as it seems to me, unsuccessfully seeking to distinguish them from the cases at bar, and, in so doing, inadvertently, of course, misstating the question involved in them. The following is the language of the opinion with reference to the case containing the reasoning on the constitutional question: "The case of Commonwealth *v.* East Tennessee Coal Co., 97 Ky. 238, did not involve the revocation of a license granted by the State, but was in effect similar to Barron *v.* Burnside, above cited, being a proceeding to impose a fine on the defendant after it removed a case from the State

court." Judge Eastin commences his opinion with the following language: "This appeal involves the constitutionality of section 572 of the Kentucky statutes which is in these words, to wit:" * * * Then, after citing section 572, he said:

"Under this provision of the statutes, this action was brought by appellant in the Whitley circuit court for the purpose of
47 having it judicially declared that appellee had forfeited its right to carry on business in Kentucky, and of enjoining it from doing so. In the petition, it is alleged that appellee is a foreign corporation, created by the laws of the State of Tennessee, but engaged for several years past in carrying on business in Whitley county in this State, and that on May 14, 1894, it had, by proper proceedings, procured the removal from the Whitley circuit court, of an action therein pending against it, to the Federal court sitting at Frankfort, Ky., on the alleged ground that said suit involved a controversy between citizens of different States, and that this was done without the consent of the adverse party to said action. It is further alleged that, by this action, appellee has forfeited its right to carry on business in this State, but that, notwithstanding this fact, it is still engaged in carrying on its business in Whitley county, Kentucky, and the court below is asked to decree the existence of the alleged forfeiture and to enjoin appellee from further continuing its said business in Kentucky."

So that the court are mistaken in supposing that the case
48 explained simply involved the imposition of a fine. It was nothing more or less than a proceeding to revoke the license or right to do business in Kentucky of a foreign corporation, for the sole reason that it had exercised its privilege of removing an action, instituted against it by a citizen of this State, to the Federal court. In principle the questions involved there and here are identical. With this question before it, the court there held that section 572 was unconstitutional, after a review of all the Federal decisions on the subject. The opinion concludes in these words:

"From this review of the decisions of the Supreme Court of the United States, it would seem that there is no longer any question as to the invalidity of legislation such as this act we are now considering. Those decisions establish the doctrine that this right of removal is a constitutional privilege conferred by the Constitution and laws of the United States upon every citizen of a State, foreign to the State in which the suit is brought, which would clearly embrace all foreign corporations; and any legislation on part of the State, by which it is proposed or designed to take away that privilege,
49 even under the power of the State to fix the terms upon which the corporation may enter that State, for the purpose of doing business, is unconstitutional and void.

"In accordance with these views we adjudge that section 572 of the Kentucky statutes is unconstitutional, and that the demurrer of appellee to the petition filed against it by appellant was properly sustained."

The case of Commonwealth *v.* Jellico Coal Company did involve the right to fine a foreign corporation for removing an action instituted against it by a citizen of the State to the Federal court, and the right to impose this fine was denied upon a simple question of procedure under the statute; however, the court did not rest here, but, after deciding the case adversely to the Commonwealth on the first ground, said: "* * * but, in addition to this, and for the reasons fully set forth in the opinion this day delivered in the case of Commonwealth *v.* East Tennessee Coal Co., *ante*, p. 246, with which this appeal was heard, it is the opinion of this court that the section of the statute above referred to is in conflict with the Constitution and laws of the United States, and therefore void."

50 So that it is plain that this court, as then constituted, were of opinion that section 572 was unconstitutional, and, under its provisions, neither a fine could be imposed for a violation of its terms, nor the right to do business by a foreign corporation prevented in a direct proceeding had for that purpose.

These cases, and especially the first one, so far as the principle involved is concerned, are identical with that in the cases at bar. Of course, I recognize the inutility of pointing out a conflict between older and later opinions of the same court on the same question; the last is always the law. But I deeply regret that an opinion showing such painstaking labor and learning, as does that in Commonwealth *v.* East Tennessee Coal Company, should receive no better fate at the hands of the court, as at present constituted, than to be silently ignored, or, worse still, should only have been thought worthy of a casual line, which wholly misstates the question involved.

But there are cases which cannot be so lightly thrust aside, being the utterances of the Supreme Court of the United States, which is the final expositor of all questions arising under the Constitution and the laws of the United States.

51 The question in hand, so far as I am advised, was adjudicated by the Supreme Court of the United States for the first time in Insurance Co. *v.* Morse, 87 U. S. (20 Wall.) 445. This case went up from the State of Wisconsin under a statute, the pertinent part of which is as follows:

"It shall not be lawful for any fire insurance company, association, or partnership, incorporated by or organized under the laws of any other State of the United States, or any foreign government, for any of the purposes specified in this act, directly or indirectly to take risks or transact any business of insurance in this State, unless possessed of the amount of actual capital required of similar companies formed under the provisions of this act; any such company desiring to transact any such business as aforesaid by any agent or agents, in this State, shall first appoint an attorney in this State on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States circuit court or Federal courts, and file in the office

of the secretary of state a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substi-ted."

The question arose in this way: The Home Insurance Company of New York having been sued in Wisconsin by a citizen of
52 that State, undertook to remove the action under the Federal statute to the Federal court. This was resisted because the company had agreed, in compliance with the statute above quoted, not to remove such actions to the Federal courts, and this fact being established, the State court refused to permit the removal, and entered judgment on final hearing against the company. The Supreme Court of the United States, on writ of error, reversed the supreme court of Wisconsin, and returned the case with directions to grant the removal in accordance with the prayer of the petition. This was done on two grounds; first, that the agreement was void at common law, and, second, it was void because it was in contravention of the National Constitution, and statutes passed pursuant thereto, permitting the removal in question. The court said (page 458):

"We are not able to discover in this case any countenance for the statute of Wisconsin which we are considering.

"On this branch of the case the conclusion is this:

"1st. The Constitution of the United States secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the Federal court, upon compliance with the terms of the act of 1789.

53 "2nd. The statute of Wisconsin is an obstruction to this right, and is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void.

"3rd. The agreement of the insurance company derived no support from an unconstitutional statute and is void, as it would be had no such statute been passed."

The case of Doyle *v.* Continental Insurance Company afterwards went up from the supreme court of Wisconsin to the Supreme Court of the United States on a different phase of the same statute. In that case, the insurance company removed the cause, and the State authorities undertook to revoke the license to do business in the State for this violation of the statute. The company instituted a suit in equity for an injunction restraining the secretary of state from this alleged wrongful act. A temporary restraining order was entered, and, upon final hearing, was made perpetual. On appeal, the Supreme Court held that the foreign insurance company was without remedy under the circumstances, and that the State could revoke the license even under an unconstitutional law.
54 There can be no doubt that the opinion in this case fully sustains that of the majority in the case at bar, and, if it still expresses the law, my brethren are correct in the conclusion they have reached in the cases under consideration. But, afterwards, the case of Barron *v.* Burnside, 121 U. S. 186, came on for adjudication,

and involved a still different phase of a similar statute. This case arose in Iowa, under a statute not differing in principle from any of the statutes hereinbefore stated or discussed. The law denounced a fine against any foreign corporation doing business in Iowa without a permit or license; sections 3 and 4 being as follows:

"SEC. 3. Any foreign corporation sued or impleaded in any of the courts of this State upon any contract made or executed in this State or to be performed in this State or for any act or omission, public or private, arising, originating or happening in the State, who shall remove any such cause from such State court into any of the Federal courts held or sitting in this State, for the cause that such corporation is a non-resident of this State or a resident of another State than that of the adverse party, or of local prejudice against such corporation, shall thereupon forfeit and render null and void any permit issued or authority granted to such corporation to transact business in this State; such forfeiture to be determined from the record of removal, and to date from the date of filing of the
55 application on which such removal is affected, and whenever any corporation shall thus forfeit its said permit no new permit shall be issued to it for the space of three months, unless the executive council shall for satisfactory reasons cause it to be issued sooner."

"SEC. 4. Any foreign corporation that shall carry on its business and transact the same on and after September 1, 1886, in the State of Iowa by its officers, agents, or otherwise, without having complied with this statute, and taken out, and having a valid permit shall forfeit and pay to the State for each and every day in which such business is transacted and carried on the sum of one hundred dollars ($100), to be recovered by suit in any court having jurisdiction. And any agent, officer or employé who shall knowingly act or transact such business for such corporation when it has no valid permit as provided herein shall be guilty of a misdemeanor and for each offense shall be fined, not to exceed one hundred dollars ($100), or imprisined in the county jail not to exceed thirty days and pay all costs of prosecution."

The Chicago and Northwestern Railroad Company was an Illinois corporation doing business in Iowa without the permit or license required by the statute. One of its engineers was arrested and fined for carrying on the business of the corporation when it had no permit to do business in the State. When this case came to the Supreme Court, both of its former adjudications on this sub-
56 ject were reviewed and the conclusion reached that the whole statute was void, because of the unconstitutionality of that part which undertook to prohibit foreign corporations from removing causes against them to the Federal court. On the subject of Doyle *v.* Continental Insurance Company, after thoroughly discussing it, the court said (page 199): "The point of the decision seems to have been, that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from

withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in Insurance Co. *v.* Morse, must be regarded as not in judgment." I differ from the majority in construing this language of the opinion. It seems to me that it was meant to overrule the opinion then under review. Any other conclusion would make it meaningless. There is no doubt but that the Iowa statute applied to the foreign insurance company involved in the litigation. Mr. Justice Blatchford opens his opinion with the following sentence: "The statute manifestly applies to the Northwestern Railway Company as an Illinois corporation;" so that if the statute was
57 valid, the proceeding against the offending engineer was also valid, as there was no question in the opinion as to the commission of the acts which contravened the statute. The court concludes its review of the two cases in the following language:

"In both of the cases referred to, the foreign corporation has made the agreement not to remove into the Federal court suits to be brought against it in the State court. In the present case no such agreement has been made, but the locomotive engineer is arrested for acting as such in the employment of the corporation, because it has refused to stipulate that it will not remove into the Federal court suits brought against it in the State court, as a condition of obtaining a permit, and consequently has not obtained such permit. Its right, equally with any individual citizen, to remove into the Federal court, under the laws of the United States, such suits as are mentioned in the third section of the Iowa statute, is too firmly established by the decisions of this court to be questioned at this day; and the State of Iowa might as well pass a statute to deprive
58 an individual citizen of another State of his right to remove such suits.

"As the Iowa statute made the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void."

The inherent infirmity of the majority opinion lies in the effect it gives to an unconstitutional statute. The Supreme Court, in the case of Norton *v.* Shelby County, 118 U. S. Rep., 442, on this subject says: "An unconstitutional act is not a law; it confers no right; it imposes no duty; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." In Cooley's Constitutional Limitations, (page 188) it is said: "When a statute is adjudged to be unconstitutional, it is as if it has never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made." If this
59 be the law, then so much of the statute under consideration as is admitted to be unconstitutional is as if it had never been

enacted by the legislature; where, then, is the warrant of the insurance commissioner for the revocation of the licenses in these cases? It is no answer to say that, if a State may refuse to permit a foreign corporation to do business in the State, or to arbitrarily revoke its license so to do, (or, in other words, revoke it for no reason) that, therefore, it may do this for an invalid reason, or under the authority of an unconstitutional statute. A State can only speak through its laws, and, if the law is invalid, then the State has not spoken at all. The Commonwealth has not undertaken to prevent foreign corporations from doing business in the State, or to revoke their license so to do "for no reason," or arbitrarily; it has said to its insurance commissioner that he must grant foreign insurance companies license to transact business in this State when they comply with certain requirements, and that he must revoke this license if they remove to the Federal court a suit against them by a citizen of the State. Now, this latter part of the statute is conceded to be void, being in contravention of the laws of the United States;
60 therefore, in reading the statute, it must be omitted, and when this is done, we find no warrant for the action of the commissioner. To illustrate this, take a pen and erase from the face of the statute those parts which are admitted to be invalid, and then it will present its legal attitude towards foreign corporations; and nothing will be left which authorizes the revocation of the license. Of course, this view is predicated upon the theory that the statute is separable, and that the valid part may be segregated from the invalid. If this cannot be done, then the whole statute is void, and there is no law whatever on the subject, and, as a consequence, still less authority (if that were possible) for the revocation.

No practical difference can be pointed out between the statutes of Wisconsin, Iowa, or Kentucky, on the subject under discussion. They were all enacted for the same purpose, and even the verb-age is remarkable in its similarity. In the cases at bar, the corporations bear the same attitude toward the laws of the State of Kentucky as did the corporation toward the laws of the State of Iowa, and the analogy is complete when the license is revoked by
61 the commissioner; for a corporation whose license is revoked is in precisely the same relation towards the law as one which never had a license. If this be so (and it seems axiomatic), of what avail is the conclusion of the majority, if it results that the revocation of the license is a mere *brutem fulmen*, and that the State is unable to invoke the vindicatory part of the statute because of its invalidity? Is so fine a distinction worth the drawing? It seems to me this must be answered in the negative. And yet this is the precise result of the revocation of the insurance commissioner in these cases, if the opinion in Barron *v.* Burnside expresses the law.

The opinion of the majority, as said heretofore, is not only contrary to authority, but also to reason. The policy of the national law under discussion is to place, as far as possible, a citizen of one

State engaged in litigation with a citizen of another State, on a plane of equality before the law; in other words, to make it possible that the stranger may defend his property or rights free from the bias of local prejudice or passion. No disinterested mind will deny that this is a just policy. The question then is whether
62 this beneficent policy in the interest of a fair and impartial trial to the foreign citizen may be nullified by a statute enacted for the selfish purpose of giving the citizen the advantage of a trial close to his home (to put the most favorable construction on it) without any regard to the still greater distance of the stranger from his home, and his inconvenience on that score, or of the danger of his suffering from local prejudice or passion in a suit with the citizen. The State statute considers only the convenience of the citizen as measured by the additional distance to the place of trial after removal of the case to the Federal court, and ignores the danger to the foreigner of a miscarriage of justice, on the merits of the controversy, arising from local prejudice or passion in the State tribunal. The existence of such a statute, in itself affords a justification of the national policy, as expressed in the removal statutes, if such justification were needed.

It may not be altogether impertinent to the subject in hand to say, in conclusion, that it would be well to remember that it is a narrow and provincial view, to regard these national laws as harsh and severe edicts imposed by a foreign suzerain, instead of
63 benignant laws imposed by ourselves in the interest of a broad and national justice; and that in their practical operation, many more of our own citizens are benefitted by them in their litigation in other States than are inconvenienced by them in favor of citizens of foreign States litigating in our Commonwealth.

For the foregoing reasons, I dissent from the opinion of the majority of the court in these cases.

Hazelrigg, Chenault & Hazelrigg, N. B. Hays, Henry R. Prewitt, for Insurance Co.

Wm. Marshall Bullitt, for Security Mut. Life Insurance Co.

Pirtle, Trabue, Doolan & Cox, Wm. Bro. Smith, for Travelers Ins. Co.

64 Be it remembered that afterwards on the 13 day of February 1905, there was filed in the office of the clerk of the court of appeals also a petition for writ of error from the United States Supreme Court to the court of appeals of the Commonwealth of Kentucky, which petition is hereto attached, and afterwards there was filed in the office of the clerk of the court of appeals an assignment of errors, and which is hereto attached and both are as follows:

65 Court of Appeals of Kentucky.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plaintiff in Error,
v.
HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, Defendant in Error.

Petition for Writ of Error and Assignment of Errors.

The above named The Travelers Insurance Company of Hartford, Connecticut conceiving itself aggrieved by the decision made and judgment rendered by the court of appeals of Kentucky in the cause of the above named plaintiff in error against the above named defendant in error in said court at its October term A. D. 1904, to-wit, on the 15th day of December, A. D. 1904, said court being the highest court of the State of Kentucky and the court of last resort for the hearing and determination of said cause, in which cause was drawn in question the validity of a statute of the State of Kentucky, to-wit, section 631 Kentucky Statutes, upon the ground that it was repugnant to the Constitution of the United States under which Constitution plaintiff in error claimed immunity and privilege of exemption from the operation or effect of said statute of Kentucky and the decision of said State court was in favor of the validity of said statute and against the right specially set up and claimed under the Constitution of the United States by said plaintiff in error, the said right specially claimed and set up being the right of plaintiff in error to remove to the United States circuit court for the western district of Kentucky a certain action instituted against it in the Jefferson circuit court, Jefferson county, Kentucky by
66 Abram Frankel and others for the recovery of twenty-five thousand dollars ($25,000.00), the said right being denied as aforesaid by said State court by virtue of the said State statutes;

Presents herewith its assignment of errors and prays for a writ of error to issue out of the Supreme Court of the United States to said court of appeals of Kentucky to the end that the record in said matter may be removed to the said Supreme Court of the United States, and the errors complained of by plaintiff in error may be examined and corrected and the judgment aforesaid of said court of appeals of Kentucky be reviewed and reversed.

EDMUND F. TRABUE,
Counsel for Plaintiff in Error.

Court of Appeals of Kentucky.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, Connecticut,
v.
HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky.

Assignment of Errors.

Plaintiff in error, The Travelers Insurance Company of Hartford, Connecticut feeling itself aggrieved by the findings and judgment of the court of appeals of Kentucky in the above entitled cause, comes by its attorneys and assigns errors thereto as follows, to-wit:

I.

The court of appeals of Kentucky erred in holding and adjudging that the statute passed by the General Assembly of the Commonwealth of Kentucky, constituting section 631 of the Kentucky Statutes was not in conflict with article III, section 2 of the Constitution of the United States in preventing jurisdiction by the Federal courts of controversies between citizens of different States. Plaintiff in error in the above entitled cause especially set up and
67 claimed and now avers that said section 631 was and has always been in conflict with, and offended the provision of said Constitution of the United States and the act of Congress passed pursuant thereto providing for jurisdiction in the circuit courts of the United States of actions or suits between citizens of different States, and for the right of removal on behalf of non residents to said circuit courts of the United States of actions between citizens of different States wherein the amount in dispute exceeds exclusive of interest and costs the sum or value of two thousand dollars ($2,000).

II.

The court of appeals of Kentucky erred in deciding that the threatened cancellation by the defendant in error of the authority of plaintiff in error to transact business in Kentucky because of the removal by said plaintiff in error to said circuit court of the United States of the action instituted against it by Abram Frankel and others, would not amount to nor constitute a denial to plaintiff in error of a right, privilege or immunity guaranteed or afforded to it by said Constitution of the United States and the acts of Congress passed in pursuance thereof.

III.

The court of appeals of Kentucky erred in deciding that because said section 631 of the Kentucky Statutes did not require of a foreign insurance company a stipulation not to remove cases to the United States courts and did not make its authority to transact business in

Kentucky conditioned upon its entering into such stipulation, therefore such statute did not deny and that the threatened action of defendant in error in cancelling its license would not deny to plaintiff in error a right or privilege guaranteed to it by the Constitu-
68 tion of the United States and the acts of Congress made in pursuance thereof.

IV.

The court of appeals of Kentucky erred in deciding that inasmuch as said section 631 Kentucky Statutes aforesaid did not forbid the removal of any case to the United States courts nor the institution of any action or suit in said courts, but only required the defendant in error to cancel the authority of plaintiff in error in case of the latter's removal of any action or suit to the said United States courts, or institution of any action or suit in such courts that therefore said statute did not conflict with the aforesaid provisions of the Constitution of the United States and the act of Congress made in pursuance thereof and did not deny to plaintiff in error any right, privilege or immunity guaranteed or afforded to it by the said Constitution of the United States or the act of Congress passed in pursuance thereof.

V.

That the court of appeals of Kentucky erred in deciding that section 631 aforesaid of the Kentucky Statutes was not in conflict with the Constitution of the United States, and especially not in conflict with the aforesaid article III, section 2 thereof, nor with the act of Congress passed in pursuance thereof.

VI.

The court of appeals of Kentucky erred in deciding that section 631 aforesaid of the Kentucky Statutes was not in conflict with the Constitution of the United States inasmuch as it tended to interfere with the exercise of the plaintiff in error of a right under said Constitution to remove controversies between it and citizens of the
69 State of Kentucky to the United States courts.

VII.

That the court of appeals of Kentucky erred in deciding that section 631 of the Kentucky Statutes aforesaid was not in conflict with, and did not offend the Constitution of the United States in being designed, although designed to prevent and having the effect to prevent the exercise by plaintiff in error of a privilege guaranteed to it by the Constitution of the United States to remove to the United States courts actions and suits between it and citizens of the State of Kentucky.

VIII.

The court of appeals of Kentucky erred in holding that section 631 aforesaid, Kentucky Statutes, did not offend the Constitution of the United States in making, although it made, the authority of a foreign insurance company to transact business in Kentucky dependent upon its forbearing to exercise the right guaranteed to it by the Constitution of the United States and act of Congress passed in pursuance thereof to remove to the United States courts actions or suits within the jurisdiction of such courts instituted against such companies by citizens of Kentucky, or to institute in such courts suits within their jurisdiction against citizens of Kentucky.

IX.

The court of appeals of Kentucky erred in holding that the plaintiff in error was not entitled to the injunction which it prayed, and in not holding that section 631 aforesaid of the Kentucky Statutes was illegal and void because in conflict with the Constitution of the United States, and because it denied to plaintiff in
70 error the right, privilege and immunity conferred upon it by the said Constitution.

EDMUND F. TRABUE,
Counsel for Plaintiff in Error.

Filed —— —.
J. P. HOBSON.

70½ [Endorsed:] Filed Feb. 13 1905 J. Morgan Chinn, C. Ct.

71 And afterwards there was filed in the office of the clerk of the court of appeals, order allowing writ of error and approving bond, which order is hereto attached and is as follows:

72 Writ of Error.

UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of court of appeals of Kentucky, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said court of appeals of Kentucky, being the highest court of law or equity of the said State of Kentucky in which a decision could be had in the said suit between The Travelers Insurance Company, of Hartford, Connecticut, plaintiff, and Henry R. Prewitt, insurance commissioner of the State of Kentucky, defendant, wherein was drawn in question the validity of a statute of the State of Kentucky on the ground of its being repugnant to the Constitution of the United States and act of Congress passed in pursuance thereof and the decision was in favor of such

State statute, and against the right, privilege and immunity specially set up and claimed under the Constitution of the United States by the said The Travelers Insurance Company of Hartford, Connecticut, a manifest error hath happened to the great damage of the said The Travelers Insurance Company of Hartford, Connecticut, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 14th day of March, A. D. 1905 in the said Supreme Court, to be
72½ then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 13th day of February in the year of our Lord, one thousand nine hundred and five.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

WALTER G. CHAPMAN,
Clerk of the United States Circuit Court,
Eastern District of Kentucky.

Allowed by
J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

72¾ [Endorsed:] Filed Feb. 13 1905. J. Morgan Chinn, C. ct.

73 And afterwards there was filed in the office of the clerk of the court of appeals a supersedeas bond and which is in words and figures as follows:

74 Court of Appeals of Kentucky.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, Connecticut, Plaintiff in Error,
v.
HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, Defendant in Error.
} Bond.

Know all men by these presents: That the Travelers Insurance Company of Hartford, Connecticut, principal, and Henry W. Kennedy, surety, are held and firmly bound unto the above named Henry R. Prewitt, insurance commissioner of the State of Kentucky, in the sum of five hundred dollars ($500.00) to be paid to the ob-

ligee herein, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and our and each of our successors, heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated the 13 day of February, A. D. 1905.

[SEAL.] THE TRAVELERS INSURANCE COMPANY,
By H. B. KNOWLTON, Manager.
[SEAL.] H. W. KENNEDY.

75 Whereas, the above named The Travelers Insurance Company of Hartford, Connecticut, has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered on the 15th day of December, A. D. 1904, by the court of appeals of Kentucky in the case of the said The Travelers Insurance Company of Hartford Connecticut, against the said Henry R. Prewitt, insurance commissioner of the State of Kentucky:

Now, therefore, the condition of this obligation is such that if the above named The Travelers Insurance Company of Hartford, Connecticut, shall prosecute its said writ of error to effect and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed in the presence of us this the 11th day of February, A. D. 1905.

W. E. BRYAN.
HARRY LANCASTER.

Approved by me this the 13th day of February, 1905.
J. P. HOBSON,
Chief Justice Court of Appeals of Kentucky.

76 And afterwards there was filed in the office of the clerk of the court of appeals, a citation with proof of service endorsed thereon, and which is hereto attached and is as follows:—

77 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Henry R. Prewitt, insurance commissioner of the State of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kentucky, wherein The Travelers Insurance Company of Hartford, Connecticut is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected

and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 13th day of February, A. D. 1905, and of the Independence of the United States the one hundred and twenty-ninth.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Attest:
J. MORGAN CHINN, Clerk.

Copy of the within citation received this the 13th day of February, A. D. 1905

J. H. HAZELRIGG,
Counsel for Defendant in Error.

[Endorsed:] Filed Feb. 13 1905. J. Morgan Chinn, C. ct.

78 COMMONWEALTH OF KENTUCKY, }
The Court of Appeals. }

I J. Morgan Chinn clerk of the court of appeals of the Commonwealth of Kentucky, do hereby certify that the foregoing pages contain a full true and complete copy and transcript of the record and proceedings had in the court of appeals of the Commonwealth of Kentucky including the opinion of said court in the action of The Travelers Ins. Co., appellant, *vs.* Henry R. Prewitt, appellee, as full and complete as the same remain on file and of record in my office, which I herewith transmit in pursuance of the command of the writ of error thereto attached.

I also further certify that with said transcript is attached the original petition for writ of error, the original assignment of errors, the original order allowing the writ of error and approving the bond, and a copy of the bond.

I also further certify that *that* the original citation with the proof of service, endorsed thereon, and the original writ of error are hereto attached, and herewith returned.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court. Done at Frankfort at the capitol at Frankfort, on this the 15th day of February, A. D. 1905.

[Seal Kentucky Court of Appeals.]

J. MORGAN CHINN,
Clerk of the Court of Appeals of Kentucky.

Endorsed on cover: File No. 19,639. Kentucky court of appeals. Term No. 539. The Travelers Insurance Company of Hartford, Connecticut, plaintiff in error, *vs.* Henry R. Prewitt, insurance commissioner of the State of Kentucky. Filed February 20th, 1905. File No. 19,639.

FILE COPY

No. 184. OF OCTOBER TERM, 1905.

Supreme Court U. S.
FILED
JAN 5 1906
JAMES H. MCKENNEY,

IN THE

Supreme Court of the United States.

The Travelers' Insurance Company, of Hartford, Conn., Plaintiff in Error,

vs.

Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN G. JOHNSON,
EDMUND F. TRABUE,
JOHN D. DOOLAN,
ATTILLA COX, JR.,
WILLIAM BRO SMITH,
For Plaintiffs in Error

Allen Lane & Scott Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

The Travelers' Insurance Company, of Hartford, Conn., Plaintiff in Error,

vs.

Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, Defendant in Error.

October Term, 1905.

No. 184.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This writ of error is to the judgment of the Court of Appeals of Kentucky, entered against plaintiff in error December 15th, A. D. 1904. (83 S. W. Rep., 611.)

The question involved is whether or not a State may, by its legislation, impose upon a foreign corporation admitted to its territory, the penalty of expulsion for refusal to surrender its right of resort to the Federal courts.

The facts are that plaintiff in error, on the tenth day of October, 1904, filed its petition in the Jefferson Cir-

cuit Court, praying an injunction to restrain the Insurance Commissioner from canceling its warrant of authority to transact business in Kentucky. (Record, page 1.) It averred that this authority, pursuant to statutory provision, had been granted by the Commissioner July 1st, 1904, to continue for the next ensuing year, and that licenses in accordance therewith had been issued to its agents covering the same period. It alleged, specifically, facts showing compliance with all other requirements of Kentucky statutes; that this was well known to the Commissioner; but that because of its removal to the Federal court of an action instituted against it in said court by one Frankel and others, No. 37,160, said Insurance Commissioner threatened to cancel, and unless enjoined, would cancel, said authority to transact business in Kentucky. It further averred that its business was large and valuable, and that the cancellation of its authority to transact the same would cause it irreparable injury. It specially set up and claimed, that its right of removal, was inviolate under the guarantee of the Federal Constitution and laws.

A demurrer to the petition was sustained (Record, page 4), and the petition was dismissed. (Record, page 10.) This judgment was affirmed, upon appeal, by the court of last resort in the State. (Record, page 11.)

The Commissioner's threatened action was based upon section 631, Kentucky Statutes, which is as follows:—

> "Before authority is granted to any foreign insur-
> "ance company to do business in this State, it must
> "file with the Commissioner a resolution adopted by
> "its board of directors, consenting that service of
> "process upon any agent of such company in this
> "State, or upon the Commissioner of Insurance of this
> "State, in any action brought or pending in this
> "State, shall be a valid service upon said company;
> "and if process is served upon the Commissioner it
> "shall be his duty to at once send it by mail, ad-
> "dressed to the company at its principal office: and
> "if any company shall, without the consent of the

"other party to any suit or proceeding brought by "or against it in any court of this State, remove said "suit or proceeding to any Federal court, or shall in- "stitute any suit or proceeding against any citizen of "this State in any Federal court, it shall be the duty "of the Commissioner to forthwith revoke all au- "thority to such company and its agents to do busi- "ness in this State, and to publish such revocation in "some newspaper of general circulation published in "the State."

The statutory provisions in point, and in the context are found in section 633, which provides:—

"Licenses to agents of foreign companies must be "renewed annually in the same manner as original "licenses, upon a finding by the Commissioner that "the company represented by the agent has fully "complied with the law, and maintains its required "capital or reserve; and whoever solicits and receives "application for insurance on behalf of any insur- "ance company, or transmits for any person other "than himself an application for insurance, or a policy "of insurance to or from such company, or adver- "tises that he will receive or transmit the same, or "who shall, in any manner, directly or indirectly, "aid or assist in transacting the insurance business "of any insurance company, shall be held to be an "agent of such company within the meaning of this "article, anything in the policy or application to the "contrary notwithstanding; and any person acting as "the agent of any company within the meaning of "this section, without first procuring and having a "license from the Commissioner to act as such agent, "or, after such license has expired, been suspended "or revoked, or who shall procure any premium or "obligation therefor by fraudulent representations, "shall be deemed and held to be guilty of a misde- "meanor, and, upon conviction for such offense, shall "be fined not less than fifty nor more than one hun- "dred dollars for each offense."

Section 634 reads:—

"Every insurance company not organized under "the laws of this State, before transacting any busi- "ness in this State, if it has not already done so, shall "return to the Commissioner a copy of its charter, "articles of association, or deed of settlement, by "whatever name its organic law may be called, and "the Commissioner, upon being satisfied that such "company has fully complied with the laws of this "State, and is possessed of the legal reserve, shall "furnish to such agents as the company directs a "license to transact business as agent for said com- "pany under the seal of the Insurance Department."

Section 638 reads:—

"If insurance is made by any company as au- "thorized by this law to be made, but without a com- "pliance with the requirements of the laws of this "State, the contract shall be valid; but the agent or "person making the insurance shall be liable to a "fine not exceeding one thousand dollars for each "offense."

Section 752 provides for examination of the *status* of each insurance company, and, in the event of a refusal to permit an examination by the Commissioner, directs that "he shall revoke the certificate of authority and "license of such company and its agents;" and section 753 provides:—

"If he (Insurance Commissioner) is of the opinion, "upon examination or other evidence, that a foreign "insurance company is in an unsound condition, or if "it has failed to comply with the law, or if its officers "or agents refuse to submit to examination or to "perform any legal obligation in relation thereto, or, "if a life insurance company, that its actual funds "are less than its liabilities, he shall revoke or sus- "pend all certificates of authority granted to it or "its agents, and shall cause notifications thereof to

"be published in some newspaper of this State hav-
"ing general circulation therein; and no new busi-
"ness shall thereafter be done by it or its agents in
"this Commonwealth while such default or disability
"continues, nor until its authority to do business is
"restored by the Commissioner. If, upon examina-
"tion, he is of opinion that any domestic insurance
"company is insolvent, or has exceeded its powers,
"or has failed to comply with any provision of law,
"or that its condition is such as to render its further
"proceedings hazardous to the public or to its policy
"holders, he shall revoke or suspend all licenses is-
"sued to it or its agents, and cause notice thereof
"to be published in some paper having general circu-
"lation in the State; and it is hereby also made the
"duty of the Commissioner to immediately notify
"the general agents of the foreign or domestic com-
"pany suspended of the suspension, and it shall be
"the duty of said agents to immediately notify per-
"sons insured by them of such suspension by the Com-
"missioner, and for failure so to do upon the part of
"the Commissioner, or agent, he shall be fined not
"less than fifty nor more than one hundred dollars for
"each offense; he shall also apply to the judge of the
"Franklin Circuit Court or the judge of the Circuit
"Court where the company is located, to issue an in-
"junction restraining it in whole or in part from fur-
"ther proceeding with its business. Such judge may,
"in his discretion, issue the injunction forthwith, or
"upon notice and hearing thereon, and after a full
"hearing of the matter may dissolve or modify such
"injunction or make it perpetual; and may make all
"orders and decrees needful in the premises, and
"may appoint agents or receivers to take possession
"of the property and effects of the company, and to
"settle its affairs subject to such rules and orders as
"the court may from time to time prescribe, accord-
"ing to the course of proceedings in equity: *Provided*,
"That if any injunction issued hereunder be dis-
"solved, and the court or judge dissolving the same
"shall not state in the order or decree of dissolution
"that there were reasonable grounds for procuring

"such injunction, the cost of such proceeding shall "be taxed and paid out of the funds of the Insurance "Department."

Assignment of Errors.

The errors assigned are to the error of the State court in holding that section 631 of the Kentucky statutes aforesaid, did not offend the Federal Constitution in directing the Insurance Commissioner of the State to cancel the license of any foreign insurance company which instituted an action in the Federal court, or which removed thereto, any action instituted against it in the State court.

Argument.

The gist of the decision adverse to the plaintiff in error in the State court, is, that although the right of removal to the Federal courts is one guaranteed by the Federal Constitution and statutes and is one which cannot be impaired by State legislation, nevertheless the impairment of the Federal right so guaranteed may be accomplished indirectly, either by requiring the corporation possessing the right to consent to its surrender, upon penalty of expulsion from the State, or by admitting it into the State under a grant of authority to transact business, coupled with the condition that it shall never exercise the right.

In support of this position, the contention is, that no Federal right is impaired; that the State does not forbid the foreign corporation to exercise the right, nor punish it for exercising it, but simply requires it to leave the State in case it shall be unwilling to forego its exercise. The court says:—

"The validity of the latter clause of the section "(section 631) is the only question to be determined

"upon the appeal. It is insisted that it is in conflict "with the Constitution of the United States. (Rec- "ord, page 13).

"Our statute is not liable to the objections made "to the statute in either the Morse case or the Bar- "ron case. Under our statute the foreign insurance "company is at liberty to remove its cause to the "Federal Court whenever it sees proper. It is re- "quired to sign no stipulation or agreement interfer- "ing with that right. The regulation is reasonable "that the State for the protection of its citizens "against unsafe insurance companies should require "them before doing business in the State to obtain "a license," &c. "The license which the State "grants is purely a matter of grace, and like any "other license may be revoked by the licensor at "pleasure. The revocation of the license interferes "with no legal right of the licensee; for when he takes "it he takes it subject to revocation. He cannot "question the reason of the licensor for revoking the "license, as the State may exclude foreign corpora- "tions from doing business in the State with or with- "our reason."

"The State, by her statutes above referred to, in "effect, says to the foreign insurance companies, 'I " 'will license you to do business here on the same " 'plane as domestic corporations, and if you come " 'here you must stand on no more favorable ground " 'than the domestic insurance companies. If after " 'you come, you refuse to so stand I will withdraw " 'my license.'" (Record, page 17.)

The court then declares that the reason of the statute is, not distrust of Federal courts, but a practical denial of justice in view of the distance to the Federal court in a sparsely-settled State, &c.

The dissenting judges declare:—

"The question presented by these records is "whether a State may enact a valid law, which shall "present to a foreign corporation the alternative "either of surrendering its right, under the provi-

"sions of the Constitution and laws of the United "States, to remove to the Federal court an action "instituted against it by a citizen in the State court, "or of not being permitted to do business in the "State. The proper solution of this question is es- "sential to the orderly adjustment of the conflicting "spheres of our dual system of jurisprudence—na- "tional and State." * * * "The statutes of the "United States, in pursuance of a settled national "policy of affording to citizens of each State the "means of escaping the dangers of local prejudice in "favor of home litigants, prescribe the conditions "and terms under which such actions may be re- "moved to the Federal courts. This is done in the "interest of fair and impartial trials, or, in other words, "in the interest of justice." (Record, page 19.)

"It may not be altogether impertinent to the sub- "ject in hand to say, in conclusion, that it would be "well to remember that it is a narrow and provincial "view to regard these national laws as harsh and "severe edicts imposed by foreign suzerain, instead "of benignant laws imposed by ourselves in the in- "terest of a broad and national justice; and that in "their practical operation, many more of our own "citizens are benefited by them in their litigation in "other States than are inconvenienced by them in "favor of citizens of foreign States litigating in our "Commonwealth." (Record, page 28.)

It is obvious, from the statement of the proposition against us, that the adverse doctrine is, that a foreign corporation admitted to the State has no rights whatsoever except such as it may enjoy at the caprice of the State, exercisable and exercised, in violation of rights guaranteed by the Constitution of the United States; that the corporation can only remain, divested of rights guaranteed by the Federal Constitution and Federal statutes; that, except because of limitations in the State Constitution, the corporation may be compelled to renounce access to courts erected for its protection by the Constitution of the United States; to renounce the guar-

antee to it of due process of law given to it by the Fourteenth Amendment and all other immunities against the exercise of arbitrary power.

We submit that the doctrine of the State court is unsound and is in conflict with all the decisions of this court saving that of Doyle *vs.* Continental Ins. Co., 94 U. S., 535, which we claim was overruled in Barron *vs.* Burnside, 121 U. S., 186. If, as held in Home, &c., Co. *vs.* Morse, 20 Wall., 445, the State cannot deprive a foreign insurance company of its right of access to the Federal courts, upon what principle can it impose upon it the penalty of expulsion from the State if it exercise that right? May the State accomplish by indirection what it is forbidden to do directly, or, *e converso*, if the State, as a condition of its remaining within its borders, may require a foreign corporation to surrender its right of access to the Federal courts, is not the decision of this court in Home, &c., Co. *vs.* Morse, that the State may not deprive the company of access to the Federal courts, of no avail? The foreign corporation, when admitted to the State, cannot thereafter be punished for insisting upon a right guaranteed to all, to individuals and to corporations, by the laws of the United States. However capricious the State may be in its exercise of its right to forbid entry, this forbidding will be nugatory if the law which forbids is in conflict with a requirement of such laws, and, being nugatory, there is a right to enter which can only be prevented by a valid Act denying such right. The right of access to the Federal courts is as fully guaranteed by Federal Constitution and laws as is due process, and the equal protection of the laws. If a State, by such legislation as section 631, may expel the foreign corporation for the exercise of its rights of access to the Federal courts, why may not it provide such expulsion for the refusal to submit to a deprivation of due process, or the equal protection of the laws? This court has held that by the Fourteenth Amendment, the State is forbidden to de-

prive a foreign corporation of due process and equal protection of the laws.

Smyth *vs.* Ames, 169 U. S., 466.

Due process includes access to all legal tribunals, State and Federal, and to an orderly and just administration of the laws. If the State could deny due process to a foreign corporation, it might decline to admit it except upon condition of its surrender of its right of access to either State or Federal courts, leaving it defenseless.

It has been repeatedly held by this court, that a State cannot even limit to its own courts the enforcement of a controversy of a nature included within the grant of jurisdiction to the Federal courts by the Federal Constitution and laws.

Lincoln Co. *vs.* Luning, 133 U. S., 529, 33 L. Ed., 766;

Smith, &c., Co. *vs.* McGroarty, 136 U. S., 237, 34 L. Ed., 346;

Madisonville Traction Co. *vs.* St. Bernard Mining Co., 196 U. S., 239, 49 L. Ed., 462;

Chicago & N. W. Ry. Co. *vs.* Whitton, 13 Wall., 270, 20 L. Ed., 571.

Nor can the jurisdiction of the Federal courts be impaired by State legislation.

Hyde *vs.* Stone, 20 How., 170, 15 L. Ed., 874;

Wabash, &c., Ry. Co. *vs.* Brow, 164 U. S., 271, 41 L. Ed., 431;

Smyth *vs.* Ames, 169 U. S., 466, 42 L. Ed., 819.

In Wabash, &c., Co. *vs.* Brow, this court (276) said:—

> "The legislature or the judiciary of a State can "neither defeat the right given by a constitutional "Act of Congress to remove a case from a court of "the State into the Circuit Court of the United "States, nor limit the effect of such removal."

The vice of the doctrine announced by the State court is that in declaring the absolutism of State action, it

ignores the limitation by which the Federal Constitution fetters State legislation.

It is true, that in Paul *vs.* Virginia, 8 Wall., 168, 19 L. Ed., 357, this court (181) did say:—

> "Having no absolute right of recognition in other "States, but depending for such recognition and the "enforcement of its contracts upon their assent, it "follows, as a matter of course, that such assent may "be granted upon such terms and conditions as those "States may think proper to impose. They may ex- "clude the foreign corporation entirely, they may "restrict its business to particular localities, or they "may exact such security for the performance of its "contracts with their citizens as in their judgment will "best promote the public interest. The whole matter "rests in their discretion."

This is certainly the broadest statement of the doctrine of plenary State action which has ever been made by this court, but it has said, the first saying being in Ducat *vs.* Chicago, 10 Wall., 410, 19 L. Ed., 793, in respect to the nature or degree of discrimination which a State may make between her own corporations and those of other States:—

> "It belongs to the State to determine, subject only "to such limitations on her sovereignty as may be "found in the fundamental law of the Union."

In Home Ins. Co. *vs.* Morse, 20 Wall., 445, 455-6, 22 L. Ed., 365, 369, this court gave warning that the general language in Paul *vs.* Virginia must not be accepted as unmodified by the principle announced in Lafayette, &c., Co. *vs.* French, 18 How., 407, 15 L. Ed., 453, where it said:—

> "A corporation created by Indiana can transact "business in Ohio only with the consent, express or "implied, of the latter State. This consent may be "accompanied by such conditions as Ohio may think

"fit to impose, and these conditions must be deemed "valid and effectual by other States and by this court; "*provided*, they are not repugnant to the Constitution "and laws of the United States, or inconsistent with "those rules of public law which secure the jurisdic- "tion and authority of each State from encroachment "by all others, or that principle of natural justice "which forbids condemnation without opportunity "for defense."

In the Morse case, referring to the constitutional right of access to the Federal courts, and indicating the invalidity of an agreement between a non-resident individual and a citizen of the State of the forum to abjure the Federal courts, this court said: "We see no difference "in principle between the cases supposed, and the case "before us. Every citizen is entitled to resort to all the "courts of the country, and to invoke the protection "which all the laws of all those courts afford." It was also said that the Insurance Company's right of removal was:—

"Denied to it by the State court on the ground that "it had made the agreement referred to, and that "the statute of the State authorized and required "the making of the agreement. We are not able to "distinguish this agreement and this requisition, in "principle, from a similar one made in the case of an "individual citizen of New York. A corporation has "the same right to the protection of the laws as a "natural citizen, and the same right to appeal to all "the courts of the country. The rights of an individ- "ual are not superior, in this respect, to that of a cor- "poration. The State of Wisconsin can regulate its "own corporations and the affairs of its own citizens "in subordination, however, to the Constitution of "the United States," &c.

This court has repeatedly asserted the foregoing limitation of the State's power, viz., that its acts must not be inconsistent with the Federal Constitution and laws

enacted in pursuance thereof. The decision we now assail takes no note thereof. It proceeds upon the unqualified utterances of Paul *vs.* Virginia, which, although pertinent under the circumstances of that case, are applicable to the present case only when modified by the limitation announced, as above set forth, in Lafayette, &c., Co. *vs.* French, Ducat *vs.* Chicago, &c. That limitation, we contend, to wit, that the State's action is "subject "only to such limitations on her sovereignty as may be "found in the fundamental law of the Union," or that a foreign corporation may be admitted into a State upon terms imposed by the latter, "Provided they are not re- "pugnant to the Constitution and laws of the United "States," &c., forbids a State to deny to a foreign corporation admitted to its confines the right of access to the Federal courts given it by the Federal Constitution and laws. To what did this court refer in Lafayette, &c., Co. *vs.* French, when it said that the conditions of admission of a foreign corporation must not be "repug- "nant to the Constitution and laws of the United "States?" Certainly when reaffirming the principle in Home, &c., Co. *vs.* Morse, in Barron *vs.* Burnside and subsequent cases along the same line, this court meant that the foreign corporations could not be deprived of the right of access to the Federal courts. It declared that the State, in its plenary power to prescribe the conditions of a corporation's entry of its territory, could not prescribe its surrender of its access to the Federal courts, when it held the State could not prescribe conditions "repugnant to the Constitution and laws" of the United States.

The question now presented is of the first importance. The State Legislature by the Supreme Court of the State has been permitted deliberately to defeat a provision of the Federal Constitution, and the laws enacted pursuant thereto, and to prevent their application to foreign insurance companies in Kentucky. The legislature, seeking to thwart the purpose of the framers of the Federal Constitution to provide a tribunal free from

local prejudice, is now upheld and commended by the State court as making a provision not distrustful of the Federal courts, but demanded by the convenience of the people of a "sparsely settled State." The doctrine now promulgated is that the States may accept or prevent the application of the Federal Constitution accordingly as the convenience of the people of the States may dictate; and that although they may not directly forbid, even a foreign corporation, from resorting to the Federal courts, they may accomplish the same purposes indirectly, by imposing upon the exercise of the Federal right, an enormous penalty which in the present case involves the expulsion from the State and the destruction of a large business "worth many thousands dollars."

Whilst it is conceded the State may not forbid removal, it is held that it may impose as a penalty for removal the sacrifice and destruction of an entire business built up in many years by the investment of capital, energy and brains. The proposition involves the right of the State to prevent the operation of the Federal Constitution within its borders as fully as it could if allowed to forbid the foreign corporation to remove a case to the Federal court.

The spirit of enactments like the one in question is hostile to the Federal Constitution. It involves the theory that the Constitution should not apply where its application may be inconvenient to the people of a certain State, the people being the judges. It ignores, as explained by the dissenting judges, that "many more of "our own citizens are benefitted by them ('these national " 'laws') in their litigation in other States than are in- "convenienced by them in favor of citizens of foreign "States litigating in our Commonwealth." The framers of the Federal Constitution took the view thus well expressed by the dissenting judges, but the State Legislature and a majority of the judges of the State's highest court take the contrary view. The question for this court is: Shall the Constitution or the State legislation prevail?

We contend that this question is concluded by authority. As was said by the Kentucky Supreme Court in Com. *vs.* E. Tenn. Coal Co., 97 Ky., 238:—

> "From this review of the decisions of the Supreme "Court of the United States, it would seem that there "is no longer any question as to the invalidity of legis- "lation such as this Act we are now considering. "Those decisions establish the doctrine that this right "of removal is a constitutional privilege conferred "by the Constitution and laws of the United States "upon every citizen of a State, foreign to the State "in which the suit is brought," &c.

This decision held invalid a section of the chapter embracing section 631, affecting all corporations except insurance companies. The decision we now attack makes insurance companies exceptions to the corporations having the right of removal. All foreign corporations in Kentucky may remove cases to the Federal court except insurance companies.

A review of this court's decisions confirms the enunciation of the Kentucky court in the Coal Company case.

In Lafayette, &c., Co. *vs.* French, 18 How., 404, 15 L. Ed., 451, 452, this court, holding valid a judgment in Ohio against an Indiana corporation summoned in Ohio by service upon its agent therein found, employed the language above quoted, declaring that there was nothing in the requirement of the Ohio laws which imposed upon a foreign corporation the duty of submitting to service upon its agent within the State either "unreasonable in "itself or in conflict with any principle of public law."

This, the earliest decision of this court upon the point in question, is especially instructive, because it recognized the Federal limitations upon the State's powers, although it adjudged valid the State's action in the particular case. The decision thus made this court has often repeated, in its announcement of the Federal limitations upon State legislation.

In Home, &c., *vs.* Morse, 20 Wall., 445, 22 L. Ed.,

365, an action was instituted in a State court upon a policy of insurance and was removed by the insurance company to the Federal court. The State court refused to surrender jurisdiction and proceeded to trial. A judgment rendered therein against the company was affirmed in the highest State court. The State court's retention of jurisdiction was based upon the company's agreement required by a statute of Wisconsin, which declared it unlawful for such company to transact business unless it should first appoint an agent to be served with process and should agree not to remove actions against it to Federal courts, &c. The sole question considered by this court was that of the validity of the statute requiring the agreement, and it elaborately discussed the question involved, both upon principle and authority, and held the statute invalid. After propounding the question, it recited article III., section 2, of the Constitution, and declared:—

> "The jurisdiction of the Federal courts, under this "clause of the Constitution, depends upon and is "regulated by the laws of the United States. State "legislation cannot confer jurisdiction upon the Fed- "eral courts, nor can it limit or restrict the authority "given by Congress in pursuance of the Constitution. "This has been held many times." Citing authorities.

After reciting that a corporation was a citizen within the jurisdiction clause of the Constitution and Removal Act, this court said, concerning the Act:—

> "It confers an unqualified and unrestrained right "to have the case transferred to the Federal courts "upon giving the security required. * * * The "statute of Wisconsin, however, provides as to a cer- "tain class of citizens of other States, to wit, foreign "corporations, that they shall not exercise that right, "and prohibits them from transacting their business "within that State, unless they first enter into an "agreement in writing that they will not claim or "exercise that right."

This court recites the denial of the company's right of removal because of its agreement under requirement of the statute, and declares:—

> "We are not able to distinguish this agreement "and this requisition, in principle, from a similar "one made in the case of an individual citizen of New "York. A corporation has the same right to the pro- "tection of the laws as a natural citizen, and the same "right to appeal to all the courts of the country. The "rights of an individual are not superior in this re- "spect to that of a corporation."
>
> "The State of Wisconsin can regulate its own cor- "porations and the affairs of its own citizens, in sub- "ordination, however, to the Constitution of the "United States. * * *
>
> "We do not consider the question whether the "State of Wisconsin can entirely exclude such cor- "porations from its limits, nor what reasonable terms "they may impose as a condition of their transacting "business within the State. These questions have "been before the court in other cases, but they do not "arise here."

Further, it reviews its language in Paul *vs.* Virginia and Bank *vs.* Earle, remarking, as above quoted, that it must not be taken without the limitation announced in Lafayette Ins. Co. *vs.* French and Ducat *vs.* Chicago; and observes:—

> "None of the cases so much as intimate that con- "ditions may be imposed which are repugnant to the "Constitution and laws of the United States, or in- "consistent with those rules of public law which se- "cure the jurisdiction and authority of each State "from encroachment by others."

It concludes:—

> "On this branch of the case the conclusion is this:
> "1. The Constitution of the United States secures "to citizens of another State than that in which suit "is brought an absolute right to remove their cases "into the Federal court, upon compliance with the "terms of the Act of 1789.

"2. The statute of Wisconsin is an obstruction to "this right; is repugnant to the Constitution of the "United States and the laws in pursuance thereof, "and is illegal and void.

"3. The agreement of the insurance company "derives no support from an unconstitutional statute "and is void, as it would be had no such statute been "passed."

We would especially emphasize what is thus said, because in Barron *vs.* Burnside, *infra*, this court said (199) concerning Doyle *vs.* Ins. Co.:—

"All that there is in the case beyond this, and all "that is said in the opinion which appears to be in "conflict with the adjudication in Ins. Co. *vs.* Morse, "must be regarded as not in judgment."

It consequently results:—

1. That the Federal Constitution still secures the "*absolute right*" of removal aforesaid.

2. That a State statute attempting to thwart it is an "*obstruction*" to that right and repugnant to the Federal Constitution and laws, and illegal and void.

In Doyle *vs.* Ins. Co. this court denied the right of an insurance company to enjoin a State officer from canceling its license because of its removal of a cause to the Federal court. The injunction was denied upon the ground that the State had the right to exclude the foreign corporation or to admit it upon such conditions as it chose, and that the corporation might elect whether it would remain outside the State or enter it upon the condition of surrendering its right of removing cases to the Federal court. In its opinion it is said:—

"The effect of our decision in this respect is that "the State may compel the foreign company to ab- "stain from the Federal courts or to cease to do

"business in the State. It gives the company the "option" &c.

In the dissent of Justices Bradley, Miller and Swayne it is said:—

"Though a State may have the power (if it sees fit "to subject its citizens to the inconvenience) of pro- "hibiting all foreign corporations from transacting "business within its jurisdiction, it has no power to "impose unconstitutional conditions upon their doing "so. A total prohibition may produce suffering and "may manifest a spirit of unfriendliness towards sister "States; but prohibition, except upon conditions de- "rogatory to the jurisdiction and sovereignty of the "United States, is mischievous, and productive of "hostility and disloyalty to the general government. "If the State is unwise enough to legislate the one, "it has no constitutional power to legislate the "other. The citizens of the United States, whether "as individuals or associations, corporate or incor- "porate, have a constitutional right, in proper cases, "to resort to the courts of the United States. Any "agreement, stipulation or State law precluding "them from this right is absolutely void, just as void "as would be an agreement not to resort to the State "courts for redress of wrongs, or defense of unjust "actions," &c.

After reviewing the Morse case, and the claim that power of exclusion included power to annex conditions to admission, the dissenting opinion proceeds:—

"It is just as unsound as it would be for me to say, "that, because I may without cause refuse to receive "a man as my tenant, therefore I may make it a con- "dition of his tenancy that he shall take the life of "my enemy, or rob my neighbor of his property.

"The whole thing, however free from intentional "disloyalty, is derogatory to that mutual comity and "respect which ought to prevail between the State "and general governments, and ought to meet the

"condemnation of the courts whenever brought "within their proper cognizance."

In Barron *vs.* Burnside, 121 U. S., 186, 30 L. Ed., 915, this court adopted the view of the judges who dissented in the Doyle case, and, concerning that case (199), said:—

"The point of the decision seems to have been that, "as the State had granted the license, its officers "would not be restrained by injunction, by a court of "the United States, from withdrawing it. All that "there is in the case beyond this, and all that is said "in the opinion which appears to be in conflict with "the adjudication in Ins. Co. *vs.* Morse, must be re- "garded as not in judgment."

By this enunciation the Doyle case was stripped of every vestige of force as an authority in favor of the power which the Kentucky court has adjudged to reside in the State legislatures. Whatever had been said in that case in favor of such State power was by this court expressly declared *obiter*, or "as not in judgment." This leaves an unbroken line of decision against the power now claimed for the State Legislature in the decision from which we appeal: Ins. Co. *vs.* French, 18 How., 404, L. Ed. XI., 451; Ins. Co. *vs.* Morse, 87 U. S., 20 Wall., 445, L. Ed. 22, 365; Barron *vs.* Burnside, 121 U. S., 186, L, Ed.; South Pac. Co. *vs.* Denton, 146 U. S., 202, L. Ed. 36, 942; Martin *vs.* B. & O. R. R., 151 U. S., 673, L. Ed. 30, 519; Barrow S. S. Co. *vs.* Kane, 170 U. S., 100, 42 L. Ed., 964; Blake *vs.* McClung, 172 U. S., 239, 43 L. Ed., 438; Dayton C. & I. Co. *vs.* Barton, 183 U. S., 23, 25, L. Ed. 46, 61, 64, and Federal cases, Bigelow *vs.* Nickerson, 70 Fed. R., 121; Met. L. Ins. Co. *vs.* McNall, 81 Fed. R., 888; Mut. L. Ins. Co. *vs.* Boyle, 82 Fed., 705.

Barron *vs.* Burnside is decisive of our contention. A decision of that case to the contrary, would have resulted, not in the engineer's liberation, but in his punishment. No such distinction as is attempted to be made between Barron *vs.* Burnside and Doyle *vs.* Ins. Co. is

maintainable. The cases are not distinguishable on the ground that the former involved a criminal, and the latter an equitable, proceeding. The two decisions are diametrically opposed and are irreconcilable, as appears when we reflect that if the court in Barron *vs.* Burnside had followed the doctrine of Doyle *vs.* Insurance Co. the engineer, instead of being released upon writ of *habeas corpus* would have been incarcerated for transacting business as agent of a company which had refused to obtain the license required by the statute. If, in Barron *vs.* Burnside, this court had adhered to the doctrine supposed to have been countenanced by the decision in Doyle *vs.* Ins. Co., the corporation must have abjured the State or must have obtained the license required by the statute.

In Barron *vs.* Burnside, a locomotive engineer of the Chicago and Northwestern Railway Company, in Iowa, was arrested by Sheriff Burnside under a warrant for—

> "The crime of knowingly transacting a portion of the "business of the Chicago & North-Western Railway "Company within the State of Iowa, when such rail-"way company had no valid permit to do business in "the State of Iowa," as provided by the statute.

The statute provided that thereafter any foreign corporation desiring to enter or to continue in the State should be required to file with the Secretary of State a copy of its articles, should consent to service of process upon its agents, and should request a permit to do business; that such application should contain a stipulation that the permit should be subject to each provision of the Act. One of its provisions was, that any such corporation, sued in the courts of the State, which should remove the action to the Federal court on the ground of diverse citizenship, or local prejudice, should "thereupon "forfeit and render null and void any permit issued or "authority granted to such corporation to transact busi-"ness in this State," &c. Another was that any corporation thereafter transacting business without having complied with the statute and without having obtained

a valid permit should forfeit $100, and that any agent knowingly transacting business for such company having no permit should be fined for each offense $100 or imprisoned in the county jail not exceeding thirty days, and should pay costs.

The railway company refused to obtain a permit under the statute, claiming it to be void because the right to the permit was made dependent upon surrender of the right to remove an action to the Federal court. Barron obtained a writ of *habeas corpus*, and was justified by the judgment of this court by its unanimous opinion, in which it was said (190):—

> "On the hearing before the State court it was "urged, among other things, that the statute of Iowa "is void as an attempt to interfere with the jurisdic- "tion of the Federal courts, as established by the "Constitution of the United States and Acts of Con- "gress. The court upheld the validity of the statute."

After quoting the statute, this court, in that case, said that the initial step required of the corporation, in order to obain a permit, was to file articles, consent to service of process, and agree that the permit should be subject to the provisions of the Act; that the proceeding was a unit, the various things being not separable. These premises were all:—

> "Indissolubly bound up with the application for a "permit, which is to be subject to every provision of "the Act. The permit cannot be issued unless such "a stipulation is given, and the corporation is not to "be permitted to carry on its business in the State "unless the permit is issued to it and received by "it." * * *
>
> "It is apparent that the entire purpose of this "statute is to deprive a foreign corporation, in suits "such as those mentioned in section 3, of the right "conferred upon it by the Constitution and laws of "the United States, to remove a suit from the State "court into the Federal court either on the ground

"of diversity of citizenship or of local prejudice. The "statute is not separable into parts. An affirmative "provision requiring the filing by a foreign corpora- "tion, with the Secretary of State, of a copy of its "articles of incorporation, and of an authority for the "service of process upon a designated officer or agent "in the State, might not be an unreasonable or ob- "jectionable requirement, if standing alone; but the "manner in which, in this statute, the provisions on "those subjects are coupled with the application for "the permit and with the stipulation referred to, "shows that the real and only object of the statute, "and its substantial provision, is the requirement of "the stipulation not to remove the suit into the "Federal court."

This court next limited the Doyle case in the way already recited, and after reviewing that case and the Morse case, concluded that, although there were stipulations in those cases not to remove, and none in the case before it, yet that the principle was the same. It said (200):—

"Its (railway company's) right, equally with any "individual citizen, to remove into the Federal "court, under the laws of the United States, such "suits as are mentioned in the third section of the "Iowa statute, is too firmly established by the deci- "sions of this court to be questioned at this day; and "the State of Iowa might as well pass a statute to de- "prive an individual citizen of another State of his "right to remove such suits.

"*As the Iowa statute makes the right to a permit de- "pendent upon the surrender by the foreign corporation "of a privilege secured to it by the Constitution and laws "of the United States, the statute requiring the permit "must be held to be void.*" (Italics ours.)

"The question as to the right of a State to impose "upon a corporation engaged in interstate commerce "the duty of obtaining a permit from the State, as a "condition of its right to carry on such commerce, is "a question which it is not necessary to decide in this "case. In all the cases in which this court has con-

"sidered the subject of the granting by a State to a "foreign corporation of its consent to the transaction "of business in the State, it has uniformly asserted "that no conditions can be imposed by the State "which are repugnant to the Constitution and laws "of the United States." Citing Ins. Co. *vs.* French, &c.

The feature of agreement to surrender Federal jurisdiction which there appeared was of no significance. It was the request of surrender, not the agreement, which offended the Federal Constitution and laws. The spirit of the decision was that any device of the State legislature to prevent the exercise of a right which the Federal Constitution conferred, was invalid. It was the company's "right equally with any individual citizen, to re- "move into the Federal court under the laws of the "United States, &c.," that was said to be "too firmly es- "tablished by the decisions of this court to be questioned "at this day." When this court said that the State of Iowa "might as well pass a statute to deprive an indi- "vidual citizen of another State of his right to remove "such suits" it referred to any attempt upon the part of a State to thwart the right of removal, and not to some particular device, such as the requirement of an agreement not to remove. Accordingly, it was the enactment which required the surrender of the right of removal secured by the Federal Constitution and laws, that was denounced by this court, when it vitiated the requirement of a permit, the grant of which was made dependent upon a surrender. The whole tenor of the decision is to the point that any State legislation devised to defeat the Federal right of removal is, as declared in the Morse case, is an "obstruction" to the Federal right and hostile to the Federal Constitution and laws securing it.

The principle adjudged in Barron *vs.* Burnside has been, as we have asserted, repeatedly affirmed by this court.

In Sou. Pac. Co. *vs.* Denton, 146 U. S., 202 (36 L. Ed., 942), an action was brought January 29th, 1889,

in the United States Circuit Court for the Western District of Texas by one Denton against the Southern Pacific Company to recover damages for the death of her son caused by the company's negligence. The petition alleged the plaintiff to be a citizen residing in Red River County, in the Eastern District of Texas, and the defendant a Kentucky corporation operating a railroad through Texas, to be a resident of El Paso, in the Western District of Texas. The railroad company demurred specially to the jurisdiction over defendant in the Western District of Texas, and its position was sustained by this court, which held the jurisdiction to be in the Eastern, not in the Western, District, and said:—

> "The allegations made in the petition, and ad-
> "mitted by the demurrer, bearing upon this question,
> "are that plaintiff was a citizen of Texas and resided
> "in the Eastern District thereof, and that the defend-
> "ant was a corporation incorporated by the law of
> "Kentucky and a citizen of that State, and was a
> "resident of the Western District of Texas, doing
> "business and having an agent in this district."

In considering, *inter alia*, the Texas statute providing the waiver of an objection to jurisdiction by appearing and urging it, this court said:—

> "The case at bar is not affected by either of the
> "statutes of Texas on which the counsel for the de-
> "fendant in error relies.
>
> "He contends that the plaintiff in error had con-
> "sented to be sued in the Western District by doing
> "business and appointing an agent there under the
> "statute of Texas of 1887, chapter 128, requiring for-
> "eign corporations desiring to transact business in
> "the State, 'to file with the Secretary of State a
> " 'certified copy of its articles of incorporation, duly
> " 'attested, accompanied by a resolution of its board
> " 'of directors or stockholders, authorizing the filing
> " 'thereof, and also authorizing service of process to
> " 'be made upon any of its officers or agents in this
> " 'State engaged in transacting its business, and re-
> " 'questing the issuance to such corporation of a

" 'permit to transact business in this State, said appli-
" 'cation to contain a stipulation that said permit
" 'shall be subject to each of the provisions of this
" 'Act,' one of which was that any foreign corpora-
"tion sued in a court of the State, which should re-
"move the case into a court of the United States
"held within the State 'for the cause that such cor-
" 'poration is a non-resident of this State or resident
" 'of another State from that of the adverse party or
" 'local prejudice against such corporation, shall
" 'thereupon forfeit and render null and void any
" 'permit issued or granted to such corporation to
" 'transact business in this State.' " Citing statutes.

"But that statute requiring the corporation, as a "condition precedent to obtaining a permit to do "business within the State, to surrender a right and "privilege secured to it by the Constitution and laws "of the United States, was unconstitutional and void, "and could give no validity or effect to any agree-"ment or action of the corporation in obedience to its "provisions. Home Ins. Co. of N. Y. *vs.* Morse, "87 U. S., 20 Wall., 445; Barron *vs.* Burnside, 121 "U. S., 186; Texas Land & Mortg. Co. *vs.* Worsham, "76 Texas, 556."

After considering the agreement aforesaid, required by the Texas statute, this court said:—

"But such an agreement could not, since Congress "(as held in Shaw *vs.* Quincy Mining Co. above cited) "has made citizenship of the State, with residence in "the district, the sole test of jurisdiction in this class "of cases, estop the corporation to set up non-com-"pliance with that test, when sued in a Circuit Court "of the United States."

This reaffirmance of Home Ins. Co. *vs.* Morse and Barron *vs.* Burnside, without even mention of Doyle *vs.* Ins. Co., seems to have concluded in our favor the question now presented.

This court's declaration was in emphatic condemnation of statutes like section 631, and the condemnation was expressly put upon the ground that a statute requiring a

corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right secured to it by the Federal Constitution and laws, was unconstitutional and void, giving no validity to any agreement or action of the corporation in obedience to its provisions. The broad doctrine for which we contend upon the authority of Home Ins. Co. *vs.* Moss and Barron *vs.* Burnside was reaffirmed and was announced as incontrovertible.

In Martin *vs.* B. & O. Ry. Co., 151 U. S., 684 (38 L. Ed., 315), this court, sustaining Federal jurisdiction on removal from the State court of an action brought in West Virginia by a citizen of that State against a corporation of Maryland licensed to operate a railroad in West Virginia, said that the railroad company had the right, under Federal laws, to remove the action from the State to the Federal court—

> "And could not have been deprived of that right by "any provision in the statutes of the State. Home "Ins. Co. *vs.* Morse, 87 U. S., 20 Wall., 445 (22: 365); "Barron *vs.* Burnside, 121 U. S., 186 (30: 915); Sou. "Pac. Co. *vs.* Denton, 146 U. S., 202-207 (36: 942, "945.)"

In Goldey *vs.* Morning News, 156 U. S., 518 (39 L. Ed., 517), there was an action for libel in a New York court against a Connecticut corporation. The defendant appeared specially, and solely, to institute proceedings for removal of the case to the Federal court. In the Federal court a motion to quash the service of summons was sustained, and the correctness of the ruling was the question before this court. It was contended by the plaintiff, among other things, that the appearance of defendant to remove the case constituted a waiver of objection to the State court's jurisdiction. This court, holding the contrary, declared:—

> "The jurisdiction of the Circuit Court of the United "States depends upon the Acts passed by Congress "pursuant to the power conferred upon it by the Con-

"stitution of the United States and cannot be enlarged "or abridged by any statute of a State. The legisla- "ture or judiciary of a State can neither defeat the "right given by a constitutional Act of Congress to "remove a case from a court of the State into the Cir- "cuit Court of the United States, nor limit the effect "of such removal. Gordon *vs.* Longest, 41 U. S., 16 "Pet., 97 (10: 900); Home Ins. Co. of New York *vs.* "Morse, 87 U. S., 20 Wall., 445 (22: 365); Barron *vs.* "Burnside, 121 U. S., 186 (30: 915); Southern Pac. "Co. *vs.* Denton, 146 U. S., 202, 207-209 (36: 942, 945, "946). As was said by this court in Gordon *vs.* Long- "est: 'One great object in the establishment of the " 'courts of the United States and regulating their " 'jurisdiction was to have a tribunal in each State, " 'presumed to be free from local influence, and to " 'which all who were non-residents or aliens might " 'resort for legal redress.' 41 U. S., 16 Pet., 104 "(10: 900)."

Again, Home Ins. Co. *vs.* Morse, Barron *vs.* Burnside and Sou. Pac. Co. *vs.* Denton are reaffirmed without even mention of Doyle *vs.* Ins. Co.

In Barrow S. S. Co. *vs.* Kane, 170 U. S., 100 (42 L. Ed., 968), the question came to this court on a certificate in an action by Kane against Barrow Steamship Company for damages for personal injuries. The contention of the company in point was that being a foreign corporation no suit could be maintained against it *in personam* without its consent express or implied, and that by doing business in New York it consented to stay there *only as authorized by the statutes of that State*, and that the jurisdiction of the Federal courts of New York depended on the authority given by United States statutes which conferred no authority upon any court to issue process against a foreign corporation in an action by a non-resident, and for a cause not arising within the State. After an elaborate review of the authorities, and of State statutes requiring foreign corporations transacting business in the States to appoint agents to be

served with process, this court again invoked its decision in Lafayette Ins. Co. *vs.* French, and said (page 111):—

> "The object of the provisions of the Constitution "and statutes of the United States, in conferring upon "the Circuit Courts of the United States jurisdiction "of controversies between citizens of different States "of the Union, or between cities of one of the States "and aliens, was to secure a tribunal presumed to be "more impartial than a court of the State in which "one of the litigants resides.
>
> "The jurisdiction so conferred upon the national "courts cannot be abridged or impaired by any stat- "ute of a State. Hyde *vs.* Stone, 61 U. S., 20 How., "170, 175 (15: 874, 876); Smyth *vs.* Ames, 169 "U. S., 466, 516. It has therefore been decided "that a statute which requires all actions against "a county to be brought in the county court "does not prevent the Circuit Court of the United "States from taking jurisdiction of such an action; "Chief Justice Chase saying that 'no statute limita- "'tion of suability can defeat a jurisdiction given by "'the Constitution.' Cowles *vs.* Mercer County, "74 U. S., 7 Wall., 118, 122 (19: 96, 88); Lin- "coln County *vs.* Luning, 133 U. S., 529 (33: 766); "Chicot County *vs.* Sherwood, 148 U. S., 529 "(37: 546). So statutes requiring foreign corpora- "tions, as a condition of being permitted to do busi- "ness within the State, to stipulate not to remove into "the courts of the United States suits brought against "them in the courts of the State, have been adjudged "to be unconstitutional and void. Home Ins. Co. *vs.* "Morse, 87 U. S., 20 Wall., 455 (22: 365); Barron *vs.* "Burnside, 121 U. S., 186 (30: 915); Southern Pa- "cific Co. *vs.* Denton, 146 U. S., 202 (36: 942)."

Again all the previous decisions from Home Ins. Co. *vs.* Morse to Sou. Pac. Co. *vs.* Denton are reaffirmed and Doyle *vs.* Ins. Co. not mentioned.

In Blake *vs.* McClung, 172 U. S., 239, 254 (43 L. Ed., 432, 437), this court, reviewing the power of a State to give residents of the State a priority over non-residents

in the distribution of the assets of a foreign corporation, declared:—

> "We hold such discrimination against citizens of "other States to be repugnant to the second section "of the fourth article of the Constitution of the "United States, although, generally speaking, the "State has the power to prescribe the conditions upon "which foreign corporations may enter its territory "for purposes of business. Such a power cannot be "exerted with the effect of defeating or impairing "rights secured to citizens of the several States by "the supreme law of the land. Indeed, all the powers "possessed by a State must be exercised consistently "with the privileges and immunities granted or pro- "tected by the Constitution of the United States."

This court then elaborately reviewed Lafayette Ins. Co. *vs.* French, Barron *vs.* Burnside, Barrow Steamship Co. *vs.* Kane, &c., and said:—

> "So statutes requiring foreign corporations as a "condition of being permitted to do business within "the State to stipulate not to remove into the courts "of the United States suits brought against them in "the courts of the State have been adjudged to be un- "constitutional and void. Home Ins. Co. *vs.* Morse, "87 U. S., 20 Wall., 445 (22: 365); Barron *vs.* Burn- "side, 121 U. S., 186 (30: 915); Sou. Pac. Co. *vs.* "Denton, 146 U. S., 202, 207 (36: 943); see Ducat "*vs.* Chicago, 10 Wall., 410, 415 (19: 972, 973.)"

Again, in this review of the cases of Home Ins. Co. *vs.* Morse and subsequent cases, those above mentioned are reaffirmed and Doyle *vs.* Ins. Co. is not mentioned. The decision last cited is likewise valuable, inasmuch as it concerns a guaranty of the Federal Constitution of a matter different from that of Federal jurisdiction, and emphasizes the impotence of the States, directly or indirectly, to defeat any of the provisions of the Federal Constitution and laws.

In Dayton Coal & Iron Co. *vs.* Barton, 183 U. S., 23, 24 (46 L. Ed., 61, 64), a foreign corporation questioned the constitutionality of a State statute requiring corporations and individuals issuing store orders in payment for labor to redeem them in cash. This court, having held the statute valid as to a domestic corporation, decided against its contention, and after citing Orient Ins. Co. *vs.* Daggs, 172 U. S., 557 (43 L. Ed., 552), wherein it had said that what a State might do with its own corporations it might do with foreign corporations admitted into the State, and that the power to impose conditions upon foreign corporations was certainly as extensive as like power over domestic corporations, concluded:—

> "We do not care, however, to put our present de-
> "cision upon the fact that the plaintiff in error is a
> "foreign corporation, nor to be understood to inti-
> "mate that State legislation, invalid as contrary to
> "the Constitution of the United States, can be im-
> "posed as a condition upon the right of such a cor-
> "poration to do business within the State. Home
> "Ins. Co. *vs.* Morse, 20 Wall., 445 (22 L. Ed. 365);
> "Blake *vs.* McClung, 172 U. S., 239, 254 (43 L. Ed.,
> "432, 19 Sup. Ct. Rep., 165.)"

This court was unwilling to base its decision upon the ground, or to be understood to intimate, that a State could impose as a condition of admitting a foreign corporation to do business within its territory, a requirement contrary to the Federal Constitution. Thus are Home Ins. Co. *vs.* Morse, the earliest, and Blake *vs.* McClung, the latest, case of the class reaffirmed and Orient Ins. Co. *vs.* Daggs, so much relied on by our opponents as sustaining their contention, is distinguished.

In view of the array of authorities, from Home Ins. Co. *vs.* Morse to Dayton Coal and Iron Co. *vs.* Barton, announcing in the most unmistakable terms the doctrine we invoke, it is difficult to believe that this court will affirm the judgment of the Kentucky court. We are entitled, we submit, to its reversal, both upon principle and upon authority.

This court's decisions in the cases just cited are followed in interesting opinions in Bigelow *vs.* Nickerson, 70 Fed. R., 121; Met. L. Ins. Co. *vs.* McNall, 81 Fed. R., 888; Mut., &c., Co. *vs.* Boyle, 82 Fed. R., 705.

In Bigelow *vs.* Nickerson, the U. S. C. C. A., Seventh Circuit, held a provision limiting jurisdiction of a right of action for death, conferred by statute, to courts established by State Constitution and laws, an abortive attempt to exclude Federal jurisdiction and void. The dissenting judge sharply emphasized the decision against our opponents' present contention, by advocating the validity of the statute upon the ground that the limitation was not upon a general right of action, but upon a right created by the statute which imposed the proviso. The court held, however, that whenever a right was given by statute it might be enforced in the Federal court. After citing authorities it said that in Barron *vs.* Burnside this court had declared that it had—

> "Uniformly asserted that no conditions can be im-
> "posed by the State which are repugnant to the Con-
> "stitution and laws of the United States. We con-
> "sider the question foreclosed, and no longer open
> "to discussion. No condition imposed upon a right
> "granted by a State, which prevents one from avail-
> "ing himself of his constitutional prerogative of ap-
> "peal to the courts of the United States, can be up-
> "held."

The court, reviewing Railway *vs.* Whitton (13 Wall., 270), said (page 121):—

> "It was there objected that the right to sue in such
> "case existed by virtue of the statute only, and that
> "the right by the statute was given only on a condi-
> "tion that the suit be brought in a Wisconsin court.
> "The contention was, however, overruled by the Su-
> "preme Court by the unanimous opinion of the
> "judges."

In Met. L. Ins. Co. *vs.* McNall, the suit was by a company to enjoin the insurance superintendent from revoking

complainant's license for removing a case to the Federal court. The court finding that the officer acted contrary to law, said (page 896):—

"If the statutes of Kansas would bear the construc-
"tion contended for by defendant, giving him au-
"thority to revoke the certificates of authority of in-
"surance companies because they refused to give up
"their rights to resort to the courts for redress and
"settlement of disputed claims, the question arises.
"Could the State impose such terms on the com-
"panies? It must be admitted that the State of Kan-
"sas has the right to exclude foreign corporations en-
"tirely from doing business in the State, and it may
"impose any terms *not objectionable to the Constitu-*
"tion or laws of the United States, on any such cor-
"porations as a condition to their doing business in
"the State." Citing Ins. Co. *vs.* French, Paul *vs.* Virginia, Ins. Co. *vs.* Morse, Doyle *vs,* Ins. Co. and Barron *vs.* Burnside.

"The defendant relies upon the Doyle case to sus-
"tain his contention. In that case, the laws of Wis-
"consin in terms required the defendant to do the
"Act complained of, to wit, revoke the license of the
"insurance company, and the company had signed
"and filed its consent to the law as a condition to re-
"ceiving permission to do business in the State,
"which consent was that it would not remove its suits
"from the State to the Federal courts. This deci-
"sion, sustaining the law, was made by a divided
"court; but in the later case of Barron *vs.* Burnside,
"121 U. S., 199, 7 Sup. Ct., 931, the court affirmed the
"Morse case, which held such a stipulation invalid,
"and explained and limited the Doyle case. The
"court, speaking of the rule established in the Morse
"case, says (94 U. S., 538): 'This was upon the prin-
" 'ciple that every man is entitled to resort to all the
" 'courts of the country, to invoke the protection
" 'which all the laws and all the courts may afford
" 'him, and that he cannot barter away his life, his
" 'freedom or his constitutional rights.'

"The temporary injunction will be granted."

The decision in Mut. Life Ins. Co. *vs.* Boyle is to similar effect as Met. Life Ins. Co. *vs.* McNall.

Opponent's Authorities.

Orient Ins. Co. *vs.* Daggs, *supra*, and Waters, &c., Oil Co. *vs.* Texas, 177 U. S., 28 (44 L. Ed., 657), have no application because in those cases the conditions imposed upon the foreign corporation were only conditions imposed by the State upon its own corporations, and were not conditions which required the surrender of rights guaranteed by the Federal Constitution or laws passed in pursuance thereof. The enunciation in the opinion we now assail, that by section 631, Kentucky Statutes, the Kentucky Legislature simply declared to the foreign corporation, "I will license you to do business here on the same plane "as domestic corporations," &c. (Record, page 17), loses sight of the consideration that the foreign corporation, by virtue of its position, cannot be put upon an equality with the domestic corporation, *a circumstance so obvious to the framers of the Federal Constitution as to beget the necessity of the Federal courts.* If the Kentucky Legislature could eradicate that local prejudice which, by the framers of the Federal Constitution, was made the basis for creating the Federal courts, then there might be ground for the announcement just quoted from the State court.

This court disposes of the matter in Home Ins. Co. *vs.* Morse, in these words:—

> "The State of Wisconsin can regulate its own "corporations and the affairs of its own citizens, in "subordination, however, to the Constitution of the "United States. The requirement of an agreement "like this (to forbear access to the Federal Courts) "from their own corporations would be *brutum ful-* "*men*, because they possess no such right under the "Constitution of the United States. A foreign citi- "zen, whether natural or corporate, in this respect "possesses a right not pertaining to one of her own "citizens. There must necessarily be a difference "between the *status* of the two in this respect."

This declaration from this court ends the discussion. The Legislature of Kentucky cannot, as suggested by the Kentucky court, place upon the same plane foreign and domestic corporations, for, as stated by this court, "There "must necessarily be a difference between the *status* of the "two in this respect."

Our opponent takes great comfort from the subsequent citation by this court of Doyle *vs.* Ins. Co., but an examination of those citations dispels the illusion that it meant to reaffirm anything in the Doyle case, contrary to its decision in the long line of cases headed by Home Ins. Co. *vs.* Morse.

In U. S. *vs.* Des Moines, &c., Co., 142 U. S., 545 (35 L. Ed., 1109), and New Orleans *vs.* Warner, 175 U. S., 146 (44 L. Ed., 209), this court cites Doyle *vs.* Ins. Co. in conjunction with cases like Fletcher *vs.* Peck and *ex parte* McCardle simply for the proposition that it is not within the province of the judiciary to control the conduct of the legislature even if acting from impure motives, and that an inquiry into their motives is not to be sanctioned. In Pope, &c., Co. *vs.* Gormully, 144 U. S., 224, 236 (36 L. Ed., 414), this court held, after citing the Morse and Doyle cases, that a contract not to set up any defense whatever in any suit which might be begun upon fifty different causes of action, was in violation of public policy. It cannot, therefore, be maintained that the Doyle case, so far as impaired by the decision exactly to the contrary in Barrow *vs.* Burnside and in subsequent cases to the same effect, has been reinstated as an authority by the subsequent cases citing it. In none of those cases is there the slightest intimation of any intention to depart from Barrow *vs.* Burnside.

In Cable *vs.* U. S., &c., Co., 191 U. S., 288 (48 L. Ed., 188), this court said (page 307):—

> "Whether this case (Doyle case) has been shaken "by the subsequent case of Barron *vs.* Burnside, 121 "U. S., 186, 199, 30 L. Ed., 915, 919, 1 Inters. Com. "Rep., 295, 7 Sup. Ct. Rep., 931; Blake *vs.* McClung,

"172 U. S., 239, 254, 43 L. Ed., 432, 437, 19 Sup. Ct., "Rep., 165, and Dayton Coal & I. Co. *vs.* Barton, 183 "U. S., 23, 25, 46 L. ed. 61, 64, 22 Sup. Ct. Rep., 5, it "is not material here to discuss. It has from an early "day been held that a corporation created by one "State could transact business in another State only "with the consent, expressed or implied, of the latter "State, and that such consent might be accompanied "by such conditions as the latter State might think "fit to impose, provided they were not repugnant to "the Constitution or laws of the United States, or "inconsistent with those rules of public law which "secure the jurisdiction and authority of each State "free from encroachment by all others, or that prin- "ciple of natural justice which forbids condemnation "without opportunity for defense. Lafayette Ins. "Co. *vs.* French, 18 How., 407, 15 L. ed. 452; Wa- "ters-Pierce Oil Co. *vs.* Texas, 177 U. S., 28, 44 L. "ed., 657, 20 Sup. Ct. Rep., 518; New York L. Ins. "Co. *vs.* Cravens, 178 U. S., 389, 401, 44 L. Ed., 1116, "1124, 20 Sup. Ct. Rep., 962; John Hancock Mut. L. "Ins. Co. *vs.* Warren, 181 U. S., 73, 76, 45 L. ed., 755, "758, 21 Sup. Ct. Rep., 535."

By this language this court certainly did not intend to discredit the long line of decisions beginning with the Morse case and ending with the Dayton Coal and Iron Company case, but simply meant to say that the question now under review was not at issue. If this were not otherwise clear it would be demonstrated by the consideration that this court there repeats only what it had so often said, viz., that the State might annex conditions to its consent that a foreign corporation transact business within its borders "provided they were not repugnant to the Con- "stitution or laws of the United States," &c., citing in behalf of the proviso a long line of authorities.

In Cargill Co. *vs.* Minnesota, 180 U. S., 468, this court, speaking through Mr. Justice Harlan, said:—

"The defendant, however, insists that some of the "provisions of the statute are in violation of the Con- "stitution of the United States, and if it obtained the

"required license, it would be held to have accepted "all of its provisions, and (in the same words of the "statute) 'thereby to have agreed to comply with "'the same.' (Section 1.) The answer to this sugges- "tion is that the acceptance of a license, in whatever "form, will not impose upon the licensee an obliga- "tion to respect or to comply with any provisions of "the statute or with any regulations prescribed by "the State Railroad and Warehouse Commission "that are repugnant to the Constitution of the United "States. A license will give the defendant full au- "thority to carry on its business in accordance with "the valid laws of the State and the valid rules and "regulations prescribed by the Commission. If the "Commission refused to grant a license, or if it sought "to revoke one granted, because the applicant in the "one case, or the licensee in the other, refused to "comply with statutory provisions or with rules or "regulations inconsistent with the Constitution of the "United States, the rights of the applicant or the "licensee could be protected and enforced by appro- "priate judicial proceedings."

We submit that the present case involves a right on the part of foreign corporations different from that involved in those cases in which they have been compelled to submit to State legislation of the kind exemplified in the case of Insurance Co. *vs.* Mettler, 185 U. S., 332, and in that of the Iowa Insurance Commissioner's Appeal.

So far as regards a revocation of a license during the currency of a term in which the State has authorized an insurance company to do business therein, the revocation inflicts a penalty under a law void because contrary to the Federal Constitution. So far as the law is applicable to a grant of future licenses, it is void because against the public policy of the United States as announced by that Constitution.

The Federal Constitution guarantees, under conditions of diverse citizenship, the right of all persons and cor-

porations to have their litigations determined, free of local bias, in the Federal courts.

However a law of the State is worded, or sought to be made effective, which is in violation of the Federal Constitution, and seeks to inflict a penalty by way of revocation or of refusal to enter, upon those who assert their constitutional right, it is invalid.

Every State statute which is in direct antagonism to the public policy of the Union as announced in its Constitution and in its laws, must yield.

No corporation should be permitted to be punished by way of revocation of an entrance into a State theretofore allowed, unless such revocation is by virtue of a valid law; nor should it be denied a right to do business in a State, which right exists unless there be a valid State prohibition, if such prohibition is by virtue of an Act of Assembly denying a constitutional right of Federal protection, in violation of national policy.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

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vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY, DEFENDANT IN ERROR.

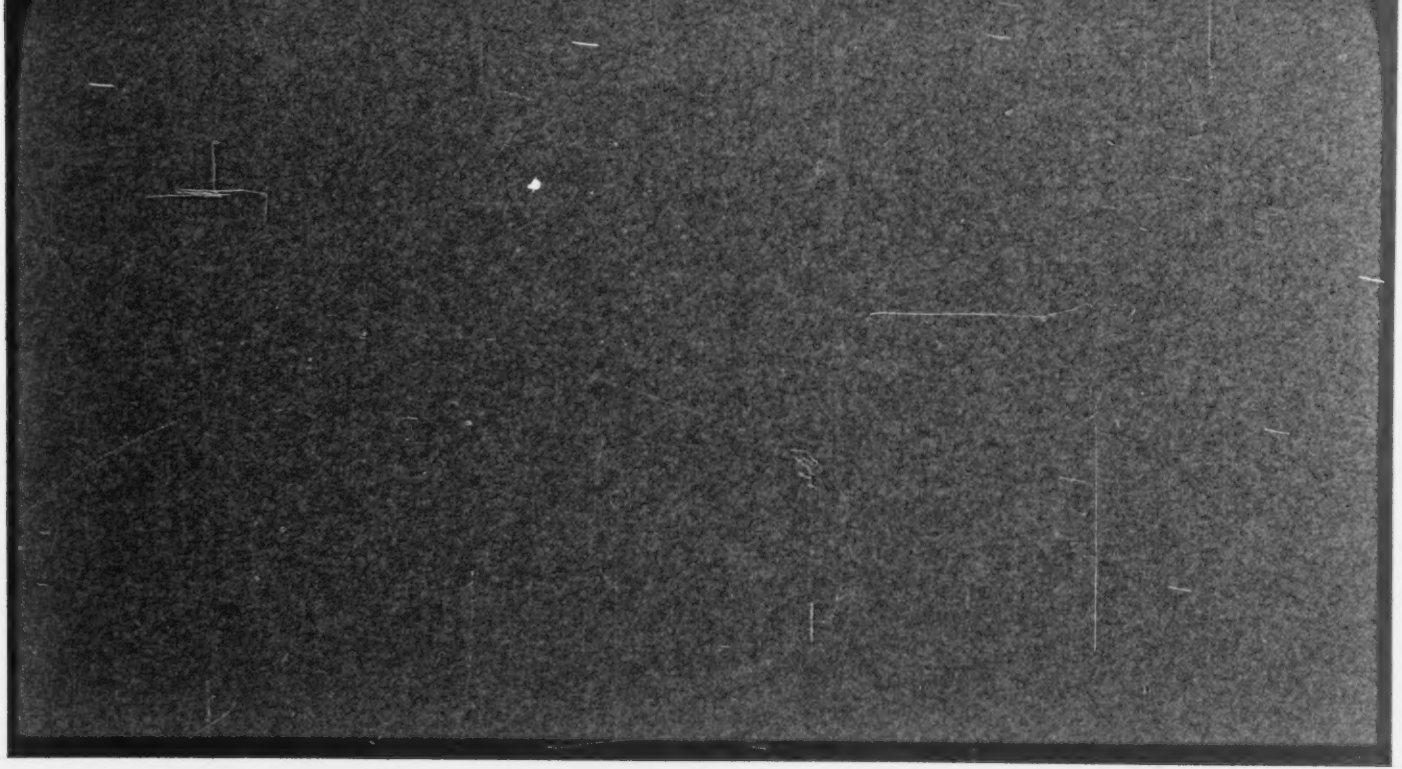
IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Reply Brief for Plaintiff in Error.

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Reply Brief for Plaintiff in Error.

Our original brief anticipated most, if not all, of our learned opponents' points, but a categorical reply to them will present most directly the pivotal issues between us. His points condensed are by him thus stated :

That "the foreign company may of course take its case into the Federal court. That is its constitutional right" (*page 4*), but "is it contrary to the Constitution and the laws of the United States that one who is entitled thereunder to remove a case to the Federal courts is left free to do so, but in the event he does remove he must forfeit a privilege held at the will of the State?" (*page 13*).

In support of their position counsel admit (*page 11*) "repug-"nancy (between Federal Constitution and State statutes) "does exist whenever the State requires the company to "agree in advance not to remove—such an agreement "is void and is so treated in all the cases. In the present "law there is no repugnancy because there is no agree-"ment—no stipulation—for a surrender of any right." (See also *page 15*.)

They define their position to be that if the statute requiring the license make its issuance depend upon a "*stipulation*" not to remove cases to the Federal court the *statute* is void (*page 24*), "and this because the parts of it which might "have been upheld as valid and lawful were so interwoven "with the unconstitutional requirement of a void stipulation "as to make the whole bad" (the Iowa statute involved wherein, by the way, provides for no "agreement" or "stipulation"), *citing Barron vs. Burnside* (*page 25*).

That, *e converso*, however, if the statute requiring the permit impose both *objectionable and unobjectionable* requirements, "but not so 'coupled' as to be inseparable" the statutory requirement of the license would be valid.

The vice of our opponents' argument is that they claim for the State the power to prevent by a general law the exercise for the future of a right which they admit is the "constitutional right" of the company under the Federal Constitution.

The admission that the requirement of the "agreement" or "stipulation" as a condition of the issuance of the license renders the statute invalid is fatal to counsel's entire contention, for an "agreement" or a "stipulation" to surrender a "constitutional right" can no more contravene the constitution than the actual surrender of the right. It is the right of removal to the Federal courts that the Constitution secures, and therefore it is the enforced surrender of the right and not any particular form of surrender that constitutes an

infringement of the Constitution and an illegal condition of a statutory requirement of a license."

Nor does the fact that the "agreement" or "stipulation" to surrender the right of removal is required to be made *in advance*, as contended by opponents, distinguish the Iowa case—or the case admitted by our opponents to infringe the Federal Constitution—from the Kentucky or instant case, for the Kentucky statute likewise *in advance* requires the insurance commissioner *to enforce the abandonment of such right of removal as long as the company remains in the State.* The right of removal could only exist while the company did business in the State, and the statute forbids the exercise of this "constitutional right" during every moment of that time. In each case the legislation provides *in advance* for destruction of the right guaranteed by the Federal Constitution and for the same period of time—*i. e.*, during the corporation's sojourn in the State.

The circumstance that the "agreement" or "stipulation" is required in one case and not in the other constitutes only a formal or nominal distinction between the cases, for it is admitted that the "*agreement*" *or* "*stipulation*" *is void, and could not prevent the removal.* In each case, therefore, the right of removal remains really unimpaired, but in each the statute provides as effectually as possible for destruction of the "constitutional right."

Nor is there any force in the suggestion that the "agreement" or "stipulation" to surrender the "constitutional right" is in one case so interwoven with the provision for license as to invalidate the entire statute, and in the other not, for the right to the license is made as dependent upon the surrender of the "constitutional right" in the latter case as upon the "agreement" or "stipulation" to surrender it in the former. The difference is in form only, and the apparent or seeming separation of the provisions for the grant of license and for the cancellation of the license in case of the removal in the Kentucky statute is purely delusive, and

contrived solely to suppress the real purpose or effect of the enactment. The material and crucial consideration is that in each case, *by provision in advance*, the company is compelled to abandon the right which the Constitution guarantees. The suggestion that the company retains the right of removal is fallacious. The right appertains only to a non-resident, only exists as incident to the non-resident company's sojourn in the State, and if it must forego the right as long as it remains, then the right is completely abandoned, whether there exist the "agreement" or "stipulation" to abandon it or not. The result, therefore, of our opponents' doctrine (*as said in our original brief, pages 8, 9*) is that some of the corporations within the State, and all individuals, would have the protection of the Federal Constitution, while others would be permitted to remain only upon condition of foregoing that protection and being subject to the exercise of arbitrary power. If the State may require the foreign corporation, *during its sojourn in the State*, to forego one guaranty of the Federal Constitution, it may equally require it to forego all, and thus there would be within the State certain corporations destitute of the protection of the Federal Constitution while others enjoyed it. It is not true, as our opponents contend, that the right of removal would remain unimpaired and only the right to transact business be impaired, for the period of the abandonment of the right of removal is by the statute made coexistent with the period of the company's sojourn in the State.

The anomaly, therefore, of some corporations with and some corporations without the protection of the Federal Constitution would, as aforesaid, exist in the State. The surrender or abandonment of the "constitutional right" of removal to the Federal courts would consequently as certainly exist as if the legislature had confessed instead of attempting to suppress the fact in the statute. The situation on the Kentucky statute, therefore, is not distinguish-

able on the constitutional objection from that on the Iowa statute noted in *Barron vs. Burnside*, albeit there was a "stipulation" for the surrender of the right of removal in the one and not in the other case.

It thus appears that the *instant case* would not be distinguishable from *Barron vs. Burnside* even if the Iowa statute required a stipulation, but in reality it requires none, nor does the Texas statute.

Accordingly we submit that *Barron vs. Burnside* (*121 U. S., 186*) and *Sou. Pac. Co. vs. Denton* (*146 U. S., 202*) are conclusive in favor of our claim "that the entire purpose of" the Kentucky statute "is to deprive the foreign corporation' * * * "of the right conferred upon it by the Constitu- "tion and laws of the United States to remove a suit from "the State court into the Federal court," &c., (*121 U. S., 197*), and that the statute essentially "makes the right to a per- "mit dependent upon the surrender by the foreign corpora- "tion of a privilege secured to it by the Constitution and "laws of the United States," and is unconstitutional (*121 U. S., 200*); and is a "vain attempt to prevent removals into "the national courts" (*146 U. S., 207*).

JOHN G. JOHNSON,
WM. BRO. SMITH,
EDMUND F. TRABUE,
Counsel.

JOHN C. DOOLAN,
ATTILLA COX, JR.,
Of Counsel.

RECEIVED
APR 4 1906
SUPREME COURT U. S.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 184.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT, - - *Plaintiff in Error,*

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY.

MOTION.

The Traverers Insurance Company, plaintiff in error, says that the authority to transact business in Kentucky which was granted to it by the Insurance Commissioner, July 1, A. D., 1904, as appears in the record, was not permitted to expire as assumed in this court's opinion herein, but that Henry R. Prewitt, Insurance Commissioner, aforesaid, in order to avoid the unnecessary loss to plaintiff in error, and the destruction of its business *pendente lite* renewed the said authority July 1, 1905, for the term of one year next ensuing, subject to his right to cancel, [illegible] with the understanding that he would cancel such authority immediately upon this court's decision in his favor of the Federal Question raised in this record, if decided in his favor; accordingly, and to manifest in this court the facts aforesaid, plaintiff in error moves the court for leave to file the affidavit of its counsel, Edmund F. Trabue, and the letter written to said Trabue by said Prewitt, March 12, 1906.

JOHN G. JOHNSON,
EDMUND F. TRABUE,
Counsel.

Notice that the above entitled motion will be made April 2, A. D., 1906, is hereby accepted.

HENRY R. PREWITT,
Insurance Commissioner,
by J. H. HAZELRIGG,
Counsel.

RECEIVED
1906

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 184.

THE TRAVELERS' INSURANCE COMPANY OF HARTFORD, CONNECTICUT, - - *Plaintiff in Error.*

v.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY.

AFFIDAVIT.

Edmund F. Trabue says that he is and has been since the inception of this suit counsel for plaintiff in error, and that on or before July 1, 1905, defendant in error renewed for one year next ensuing the authority of said plaintiff to transact business in Kentucky, upon the understanding, as affiant has always understood, that such renewal was without prejudice to said defendant's right to cancel said authority, should this court decide in defendant's favor the Federal Question of the constitutionality of Section 631, Kentucky Statutes. That said act of said defendant was done to avoid the loss that might very unjustly accrue to said plaintiff if unlawfully deprived of its authority to transact business, should Section 631 Kentucky Statutes be afterward held unconstitutional.

Affiant attaches hereto the authority issued as aforesaid, July 1, 1905, and a manuscript letter written to him

by defendant, Prewitt, on the 12th day of March, 1906, responsive to a letter affiant wrote Prewitt, in words and figures as follows:

March 9, 1906.

TRAVELERS' INS. CO. V. PREWITT.
Henry R. Prewitt, Esq.,
Insurance Commissioner,
Frankfort, Ky.

Dear Sir:

When the Travelers' license was renewed July 1, 1905, I am advised that some *memo.* was made of record probably to the effect that it was without prejudice to the rights of the Commissioner to cancel the license in case of a decision in his favor by the Supreme Court. Please advise me what was done and if there be any record send me a copy of it with *memo.* of costs of copy, and much oblige.

Hoping to see you soon, I am,

Yours very truly,

T. Y. EDMUND F. TRABUE.

Affiant says the foregoing statements are true to the best of his knowledge and belief.

EDMUND F. TRABUE.

Subscribed and sworn to before me by Edmund F. Trabue this 31st day of March, 1906. My commission expires February 15, 1908.

V. C. YEAGER,
Notary Public, Jefferson County, Kentucky.

FILE COPY.

NO. 184.

Supreme Court of the United States

OCTOBER TERM, 1905.

OFFICE OF THE CLERK
RECEIVED
APR 4 1906
SUPREME COURT U.S.

THE TRAVELERS INSURANCE COMPANY of Hartford, Connecticut, . . Plaintiff in Error,

vs.

HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky.

Petition for a Re-Hearing.

JOHN G. JOHNSON,
EDMUND F. TRABUE,
Counsel.

No. 184

Supreme Court of the United States

OCTOBER TERM, 1905.

THE TRAVELERS INSURANCE COMPANY
OF HARTFORD, CONNECTICUT, - Plaintiff in Error,

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER
OF THE STATE OF KENTUCKY.

PETITION FOR A RE-HEARING.

The said plaintiff in error comes now, and respectfully petitions this Honorable Court for a rehearing of said cause, for the following reasons, *to-wit:*

1. Because the license granted July 1, 1904, did not expire July 1, 1905, as inferred by the court, the license having been renewed July 1, 1905, for another year, unless sooner revoked, in order to prevent injustice to plaintiff in error *pendente lite;* as appears per affidavit of Edmund F. Trabue, the certificate of authority issued July 1, 1905, and the letter of the Insurance Commissioner to said Trabue dated March 12, 1906, hereto attached.

2. Because *Section 631, Kentucky Statutes,* does not limit the life of the authority to do business to the period of one year.

3. Because the case was prosecuted diligently, involved a live question when decided by the State court, was promptly brought to this court and motion to advance seasonably made

in time, if advanced, to have enabled this court to decide the case before July 1, 1905.

And your petitioner prays, therefore, that an order may be made for a rehearing of the argument in this case on a day to be appointed by this court, and at the present term, and upon such points as the court may direct.

JOHN G. JOHNSON,
EDMUND F. TRABUE,
Counsel.

We hereby certify that in our opinion the foregoing petition is well founded in point of law.

JOHN G. JOHNSON,
EDMUND F. TRABUE,
Counsel for Plaintiff in Error.

ARGUMENT.

I.

On the question of expiration of this court's jurisdiction it has always received evidence *dehors* the record. In *Dakota Co.*, v. *Glidden*, 113 U. S., 225, this court said:

> "But this court is compelled, as all courts are, to receive evidence *dehors* the record affecting their proceeding in a case before them on error or appeal."

Also, *p. 226:*

> "It is by reason of the necessity of the case that the evidence by which such matters are brought to the attention of the court must be that not found in the transcript of the original case, because it occurred since that record was made up," &c., &c.

In *Kimball* v. *Kimball*, 174 U. S., 162, this court said:

> "From the necessity of the case, this court is compelled, as all other courts are, to allow facts which affect its right and its duty to proceed in the exercise of its appellate jurisdiction, but which do not appear upon the record before it, to be proved by extrinsic evidence. *Dakota County* v. *Glidden*, 113 U. S., 222, 225, 226 (28: 981, 982); *Mills* v. *Green*, above cited."

In *Jones* v. *Montague*, 194 U. S., 147, 153 (48 L. Ed., 913), the facts subsequently occurring were proved *dehors* the record.

Clearly, therefore, the principle allowing the expiration of jurisdiction to be proved *dehors*, likewise suffices to permit an inference of the probability of the expiration of such jurisdiction to be contradicted *dehors* the record.

Inasmuch as plaintiff's authority to transact business in

Kentucky still exists, the question argued herein as to the constitutionality of *Section 631* can not be a moot question. The action of the commissioner was in *uberrima fide*, he being one of those unusually excellent officials, ready not only to do his duty, but eager to avoid injustice even to an antagonist. Recognizing the great and unnecessary loss to plaintiff to result from a hasty cancellation of its authority to do business, he even renewed that authority July 1, 1905, virtually *pendente lite*, upon the understanding that it would be promptly cancelled if this court held the Kentucky Statutes (*Section 631*) constitutional.

Accordingly, the question raised for the first time by this court was not made by defendant's counsel upon the oral argument. Both litigants realized that it was a live question, and a vital question. Defendant was not prejudiced by renewing the authority July 1, 1905, because he could cancel it immediately if this court's decision were in his favor, and plaintiff was greatly benefited by the opportunity to contest the validity of the statute without the penalty of doing so at the peril of the destruction of its business in Kentucky.

II.

Section 631, Kentucky Statutes, does not limit the period of time for which the authority is granted, but *e contra Section 4226* (see appendix) provides payment of an *annual* tax, implying that the authority is to be perpetual. The commissioner seems to have adopted the habit of limiting the authority to one year's duration and of renewing it annually, possibly because *Section 633* requires him to renew the license to the company's agents annually. Whatever, however, might have been the origin of the habit is immaterial, for the statute makes no provision for such action. A company generally has agents in Kentucky, but might transact its business without an agent in

Kentucky, *e. g.*, by correspondence. Although, therefore, the commissioner granted the authority to plaintiff to do business for one year, he also renewed that authority so that it continued from the time of the original grant, and still continues.

III.

The general rule announced by this court is that where a controversy in a case pending in this court has become purely a moot controversy without the fault of defendant in error, the appeal will be dismissed, but in the cases wherein this court has announced the rule, it appears that the question has either become a purely moot question before the case came here, or no motion to advance was made. The emphasis by this court of the absence of the motion to advance (*Tennessee* v. *Condon*, 189 U. S., 67; 47:710), indicates that this court appreciates the injustice which would result if the rule were applied to a case prosecuted vigorously by plaintiff in error and which had reached this court in ample time for decision during the life of the controversy, but had died through no delay attributable to the parties to the litigation. We submit that this court will, when it ascertains that the ordinary application of its usual rules would work an injustice which could be prevented, adjudge an exception to such rules. When, therefore, a case comes here in time for decision, and *a motion to advance is made*, and the case is one for advancement (a fact adjudicated concerning this case), we submit that the case is not one for the application of the rule on dismissal of moot questions.

In all the cases cited in the opinion, and in the other cases which this court has decided upon the same point, either the question involved had become purely a moot question before the case reached this court or this court emphasized the fact that there was no motion to advance.

Dakota, &c. v. *Glidden*, 113 U. S., 225 (28:981).
Mills v. *Green*, 159 U. S., 651 (40:293).
Kimball v. *Kimball*, 174 U. S., 158 (43:932).
Codlin v. *Kohlhausen*, 181 U. S., 151 (45:793).
Tennessee v. *Condon*, 189 U. S., 64 (47:709).
Am. Book Co. v. *Kansas*, 193 U. S., 49 (48:613).
Jones v. *Montague*, 194 U. S., 147, 153 (48:913).
Selden v. *Same*, 194 U. S., 153 (48:915).

In *Tennessee* v. *Condon*, a case of hardship to plaintiff in error might have resulted from the dismissal had a motion to advance been made and the case been proper for advancement, for the case was docketed here December 10, 1901, and no motion to advance being made, was reached for argument March 12, 1903 (see *p.* 67). It was meanwhile that the question became a moot question as to some of the parties.

Respectfully submitted,

JOHN G. JOHNSON,
EDMUND F. TRABUE,
Counsel

APPENDIX.

Kentucky Statutes, Section 4226.—Every life insurance company, other than fraternal assessment life insurance companies, not organized under the laws of this State, but doing business therein, shall on the first day of July in each year, or within thirty days thereafter, return to the Auditor of Public Accounts, for deposit in the Insurance Department, a statement under oath of all premiums receipted for on the face of the policy for original insurance and all renewal premiums received in cash or otherwise in this State, or out of this State, on business done in this State during the year ending the thirtieth day of June last preceding, or since the last returns were made and shall at the same time pay into the State treasury a tax of two dollars upon each one hundred dollars of said premiums as ascertained.

Every life insurance company not organized under the laws of this State, but doing business therein on what is known as the industrial insurance plan, whereby weekly premiums are collected, shall at the same time make a return to the Auditor of Public Accounts for deposit in the Insurance Department, a statement under oath of all premiums received on insurance written exclusively on the industrial plan, and shall at the same time pay into the State treasury a tax of two dollars upon each one hundred dollars of said premiums as ascertained.

Any insurance company mentioned in this section doing insurance business other than on the industrial plan, shall make separate reports and pay into the State treasury the taxes due thereon under each report.

FILE COPY.

Office Supreme Court U. S.
FILED
MAR 24 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. ~~129~~ 184.

THE TRAVELER'S INSURANCE COMPANY
OF HARTFORD, CONNECTICUT, - *Plaintiff in Error,*

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER
OF THE STATE OF KENTUCKY, *Defendant in Error.*

MOTION TO ADVANCE.

The defendant in error, Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, moves the court to advance this case for hearing on the docket.

BRIEF STATEMENT OF FACTS.

The plaintiff in error is a foreign life and accident insurance company, doing business in Kentucky under a license issued by the insurance commissioner. Upon being sued in a State court, the company removed the case to a Federal court, on the ground of diversity of citizenship.

Thereupon, the commissioner was about to cancel the license, when the company brought this action in the State Court—Jefferson Circuit—to enjoin the threatened cancellation. Judgment resulted in favor of the commissioner, sustaining his right to cancel the license. The

petition was, therefore, dismissed. This judgment, on appeal, was affirmed by the Kentucky Court of Appeals, the highest court of the State.

The reasons inducing the defendant in error to ask that the case—which is now being prosecuted by writ of error in this court—be advanced for an early decision are: That an orderly and proper administration of the office of Insurance Commissioner of the State is of momentous importance to the entire public, and the people generally in the State, as well as important to the numerous insurance companies doing business in the State.

According to reports in the Insurance Bureau, there are in Kentucky some 385,000 life insurance policies, insuring something like $215,000,000.00. The business of the foreign fire insurance companies is also quite large, and the legal issues presented in the case involve all foreign insurance companies of every kind.

LEGAL QUESTIONS.

The contention of the plaintiff in error, as shown by its petition below, to which a demurrer was sustained, is that the Kentucky statute (Section 631), which requires the cancellation of the license of any foreign insurance company on its removal of a suit against it to a Federal court, and under authority of which the Commissioner was about to cancel its license, is

repugnant to the Constitution of the United States, and the laws made in pursuance thereof, wherein the plaintiff in error was entitled to such removal under conditions existing in the case; and that a forfeiture of its license to do business in the State could not be made to depend on the exercise of this undoubted right of removal.

The defendant in error, admitting, of course, that the State is powerless to prevent such removal, contends, nevertheless, that the Kentucky statute providing for such cancellation of license is a valid exercise of the power of the State to exclude foreign insurance companies for any reason whatever.

Whether or not the exercise of such power is permissible under Federal law, is the sole question involved. He is advised that the plaintiff in error will unite in this motion.

Wherefore, he respectfully prays that this case be assigned to as early a day upon the docket as may be practicable.

J. H. HAZELRIGG,
Counsel for Defendant in Error.

The plaintiff in error, the Traveler's Insurance Company of Hartford, Connecticut, concurs in the request and motion of the defendant in error to advance this case.

EDMUND F. TRABUE,
Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 539.

THE TRAVELER'S INSURANCE COMPANY OF HARTFORD, CONNECTICUT . . *Plaintiff in Error,*

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY, . *Defendant in Error.*

NOTICE.

Notice is hereby given that Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, defendant in error in the above styled cause, will, on Monday, the 3rd day of April, 1905, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which is herewith served upon you, to the Supreme Court of the United States at the Capitol in the City of Washington, D. C.

J. H. HAZELRIGG,

Counsel for Henry R. Prewitt, Insurance Commissioner for the State of Kentucky.

The foregoing notice is hereby accepted and a copy of the motion is hereby acknowledged, this 20th day of March, 1905.

THE TRAVELER'S INSURANCE CO.
OF HARTFORD, CONNECTICUT,
By EDMUND F. TRABUE,
Counsel.

FILE COPY.

Office Supreme Court U. S.
FILED
NOV 24 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 184.

THE TRAVELERS INSURANCE COMPANY, OF HARTFORD, CONNECTICUT, - - *Plaintiff in Error,*

v.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY, *Defendant in Error.*

MOTION AND STIPULATION TO ADVANCE.

WHEREAS, the transcript in this case was printed as *No. 539, October Term, 1904,* and at the time when it was filed, there was also filed the transcript in *Security Mutual Life Insurance Company, Plaintiff, v. Henry R. Prewitt, Insurance Commissioner of Kentucky, Defendant, No. 530, October Term, 1904,* and motion to advance both cases made by defendant, Prewitt, and overruled by this court *without prejudice;*

AND WHEREAS, afterwards, *to wit*, at the present term of this court said case of *Security Mutual, etc., Co. v. said Prewitt is No. 178* and this case is *No. 184*, and the motion to advance for argument has been renewed, and by this court sustained in said case *No. 178, Security Mutual, etc., Co. v. Prewitt*, and said case set for hearing, January 2, A. D. 1906, but by oversight of said Prewitt, Commissioner, the motion was not renewed in said case *No. 184, Travelers Insurance Co. v. Prewitt, Commissioner*, although said Prewitt intended to renew both motions;

AND WHEREAS, the said cases were heard together by the two divisions in which they were respectively pending, of the Jefferson Circuit Court, and heard together upon appeal, in the Kentucky Court of Appeals which court rendered only one opinion covering both cases, and the said cases ought to be heard together in this court, as they involve like questions; accordingly, it is stipulated between plaintiff and defendant in error, that this case be advanced and heard January 2, A. D. 1906, as one case, with the aforesaid case *No. 178, Security Mutual, etc., Co. v. Henry R. Prewitt, Commissioner.* And both plaintiff and defendant in error move the court accordingly.

Said case *No. 178* was advanced upon motion therefor, as follows:

"MOTION TO ADVANCE.

"The defendant in error, Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, moves the court to advance this case for hearing on the docket.

"BRIEF STATEMENT OF FACTS.

"A motion to advance this case was made late in the last term (April, 1905), and was denied "*without prejudice.*" Accordingly, it is now renewed.

"The plaintiff in error is a foreign life insurance company, doing business in Kentucky under a license issued by the Insurance Commissioner (Record, 2, 3). Upon being sued in a State court, the company removed the case to the Federal court on the ground of a diversity of citizenship (Rec. 3).

"Thereupon the Commissioner canceled the license (Rec. 4); and the company brought this action in the State court—Jefferson Circuit—to compel the Insurance Commissioner to restore its license, and the lower court granted the relief upon the ground that the Kentucky statute directing such cancellation was void, as in conflict with the Federal Constitution (Rec. 8-12). The Court of Appeals of Kentucky reversed the lower court, and directed that the petition be dismissed (Rec. 14).

"The reasons inducing the Insurance Commissioner, defendant in error, to ask that the case—which is now being prosecuted by writ of error in this court—be advanced for an early decision are: That an orderly and proper administration of the office of Insurance Commissioner of the State is of momentous importance to the entire public, and the people generally in the State, as

well as important to numerous insurance companies doing business in the State.

"According to reports in the insurance bureau, there are in Kentucky some 385,000 life insurance policies, insuring something like $215,000,000.00. The business of the foreign fire insurance companies is also quite large, and the legal issues presented in the case involve all foreign insurance companies of every kind; and under the statute and the decision herein of the highest court in Kentucky, it is the duty of the defendant in error to immediately revoke the license of every insurance company in the State that removes a case to the Federal court.

"LEGAL QUESTIONS.

"The contention of the plaintiff in error, as shown by its petition below, is that the Kentucky statute (Section 631), which requires the cancellation of the license of any foreign insurance company on its removal of a suit against it to a Federal court, and under authority of which the Insurance Commissioner canceled its license, is repugnant to the Constitution of the United States, and the laws made in pursuance thereof, wherein the plaintiff in error was entitled to such removal under conditions existing in the case; and that a forfeiture of its license to do business in the State could not be made to depend on the exercise of this undoubted right of removal.

"The defendant in error, admitting, of course, that the State is powerless to prevent such removal, contends, nevertheless, that the Kentucky statute providing for such cancellation of license is a valid exercise of the power of the State to exclude foreign insurance companies for any reason whatever.

"Whether or not the exercise of such power is permissible under Federal law, is the sole question involved. He is advised that the plaintiff in error will unite in this motion.

"Wherefore, he respectfully prays that this case be advanced and assigned for oral argument to as early a day upon the docket as may be practicable."

J. H. HAZELRIGG,
Counsel for Defendant in Error."

Witness the signature of the parties hereto.

THE TRAVELERS INSURANCE COMPANY,
OF HARTFORD, CONN.

By JOHN G. JOHNSON,
EDMUND F. TRABUE,
Counsel.

HENRY R. PREWITT,
Insurance Commissioner of Kentucky.

By JAMES H. HAZELRIGG,
Counsel.



FILE COPY.

No. 184.

Office Supreme Court U. S.
FILED
DEC 29 1905
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT, ... *Plaintiff in Error,*

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF KENTUCKY, ... *Defendant in Error.*

BRIEF FOR THE DEFENDANT IN ERROR.

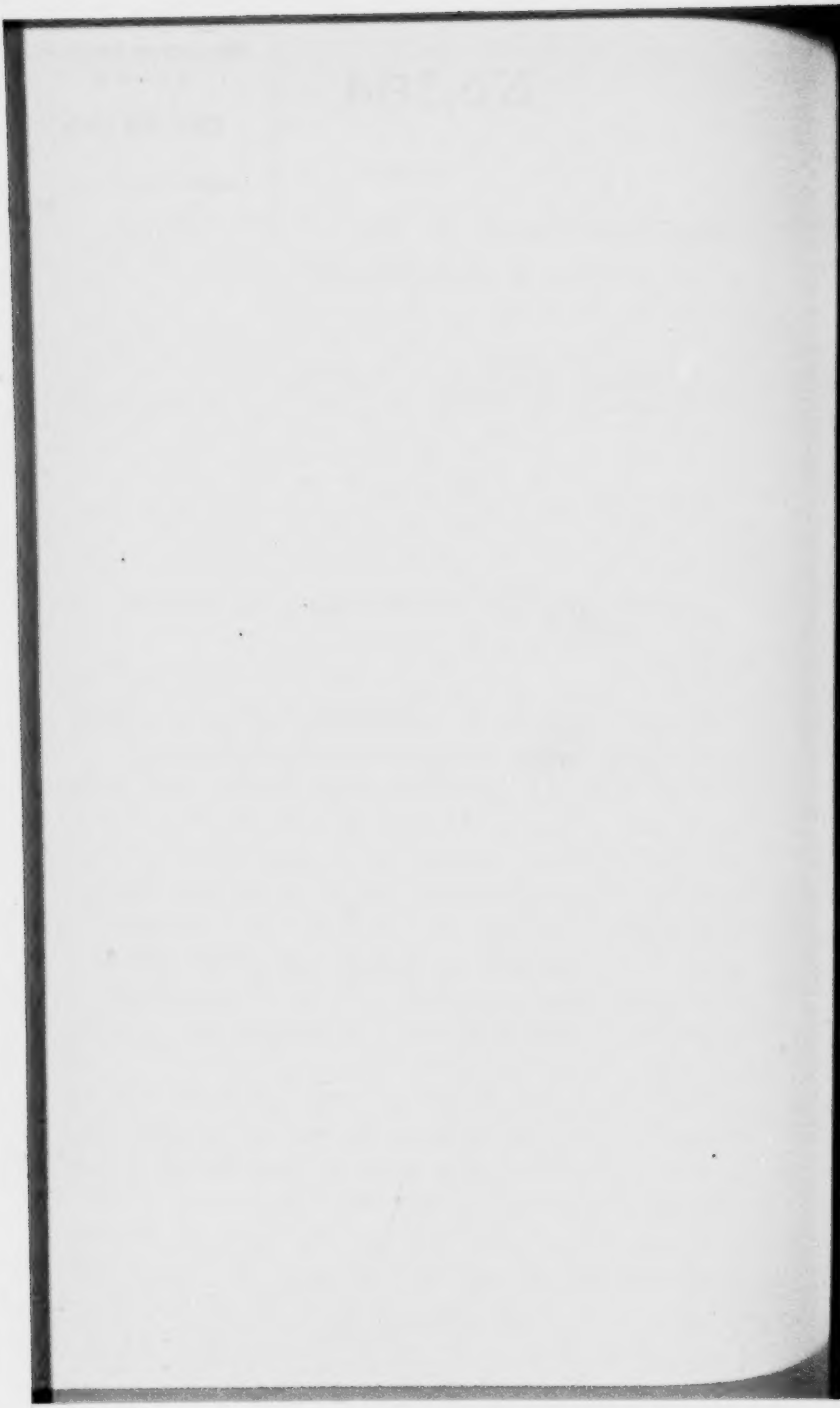
The plaintiff in error is a non-resident insurance company doing business under a license in the State of Kentucky.

When sued in a State court, it removed the case to the United States Circuit Court, and thereupon the defendant in error, the Insurance Commissioner of Kentucky, was about to revoke the license under Section 631 of the Kentucky Statutes.

Thereupon this action was filed to enjoin him from so doing. A demurrer to his petition was sustained, and his petition dismissed. On appeal, the Court of Appeals affirmed the judgment. Hence this writ of error by the insurance company.

The case is alike in principle with that of the Security Mutual Life Insurance Company against the same defendant in error, and the two cases are to be heard together by consent and with the permission of the court.

The other case, having been advanced to hearing, was fully briefed, and we ask permission to refer to same as our brief



in this case, contenting ourselves with a bare synopsis of the argument in support of our position.

It is our contention:

(1) That the right of a foreign insurance company to do business in a State depends solely on the will of the State.

Paul v. Virginia, 8 Wall. 168;
Hooper v. California, 155 U. S. 650.

And many other cases cited in these cases.

(2) That Sec. 631, Ky. Statutes, is a valid exercise of power to expel the foreign company from the State, although the reason for so doing is, that the company has removed a cause to the Federal courts—the said reason being an immaterial matter.

Doyle v. Continental Ins. Co., 94 U. S. 535;
13 A. & E. Ency. Law, 867;
6 Thompson on Corporations, §7466–67.

And this is not inconsistent with the cases of Home Ins. Co. v. Morse, 20 Wall. 445; Barron v. Burnside, 121 U. S 181; Commonwealth v. E. T. Coal Co., 97 Ky. 238, or Commonwealth v. Jellico Coal Co., 97 Ky. 246.

We respectfully ask an affirmance.

J. H. HAZELRIGG.

N. B. HAYS, *Att'y-Gen'l*,
H. R. PREWITT,
HAZELRIGG & HAZELRIGG,
Of Counsel.

Supreme Court of the United States.

Nos. 178 and 184.—October Term, 1905.

Security Mutual Life Insurance Company, Plaintiff in Error, vs. Henry R. Prewitt, Insurance Commissioner of the State of Kentucky.	In error to the Court of Appeals of the State of Kentucky.

[February 19, 1906.]

The plaintiff in error seeks by this writ to review the judgment of the Court of Appeals of Kentucky, reversing the judgment of the court below and dismissing the petition of plaintiff in error. The trial court granted such petition, which was to cancel the revocation, by the State Insurance Commissioner, of the permit granted by him to the plaintiff in error to do business in the State.

The facts are as follows: The company is an insurance company, existing under the laws of the State of New York and having its principal office in the city of Binghamton, in that State. In the year 1900 the company, pursuant to the laws of the State of Kentucky, applied to the Insurance Commissioner of that State for a permit to do business therein, and it was granted for one year from the date of such permit, which was annually renewed thereafter. On July 1, 1904, it was renewed for the last time, and the permit contained a statement that it was granted for one year, provided it was not sooner revoked. Section 635, Kentucky Statutes, provides that these licenses or permits must be renewed annually. At the time of the first application by the company for admission, (A. D. 1900,) the following statute of Kentucky was, and it ever since has been, in existence. It is known as section 631, Kentucky Statutes. The section reads as follows:

"Before authority is granted to any foreign insurance company to do business in the State it must file with the commissioner, a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State or upon the Commissioner of Insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the commissioner

to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in the State."

In September, 1904, certain parties, named Crain and Gayle, sued the company in a State court of Kentucky, and the company, without their consent, removed the suit to the Circuit Court of the United States for the Eastern District of Kentucky. Thereupon Crain and Gayle notified the State Insurance Commissioner of such removal, and demanded that the commissioner should revoke the authority of the company to do business in the State, as provided for by the above statute.

The company avers that the Insurance Commissioner did, on the sole ground of such removal, revoke the authority of the company to do business after September 29, 1904. The company thereupon demanded of the commissioner that he should set aside such revocation and cancel the same, which the commissioner refused to do.

The company then commenced these proceedings in the proper State court of Kentucky, asking that the Insurance Commissioner be required to cancel the revocation of the authority of the plaintiff and its agents to do business in the State, and that he should grant, or continue, the authority to the plaintiff, and its agents, to transact the business of life insurance in the State; and that the commissioner should be required to publish in a newspaper the fact of such cancellation, and that he should be restrained and enjoined from notifying the general agents of the plaintiff of the suspension of its license. The company specially set up the claim that, under the Constitution and laws of the United States, it was entitled to remove the suit mentioned from the State court into the United States Circuit Court for the Eastern District of Kentucky, and that any statute of the State of Kentucky in anywise restricting or affecting that right was void as a violation of the Federal Constitution.

The defendant demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The trial court overruled the demurrer, and the defendant commissioner declining to plead further, the prayer of the insurance company was granted, and judgment was entered (1) directing the defendant to cancel the revocation of the permit; (2) granting authority to the company to transact business in the State; (3) restraining the commissioner from notifying the general agents of the company of the suspension of its license and its right to do business in the State; (4) enjoining the commissioner from applying to any judge for an injunction restraining the company from further proceeding with its business. The defendant prayed an appeal to the Court of Appeals of the State, which was granted, and that court reversed the judgment of the trial court, and remanded the case with instructions to dismiss the petition, and judgment to that effect was thereupon entered. (83 S. W. Rep. 611.)

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

It appears that the laws of Kentucky require the annual renewal of the permit to any foreign insurance company, in order that the company may continue to do business in the State, and without such license the company is prohibited from doing any business therein.

The writ of error in this case was filed January 27, 1905, and the license was granted July 1, 1904, and expired by its terms, if not sooner revoked, on the 1st day of July, 1905. The permit, even if illegally revoked prior to that time, became a dead letter on July 1, 1905, so far as constituting any authority to the company to remain in the State and do business therein. If the court should now assume to cancel the revocation it could not thereby reinstate the permit, which has already expired, and the company would still be without power to do business in the State until another permit should be granted. To adjudge that the old permit remained good until the expiration of the year is to adjudge an abstract question, as no relief can be now awarded concerning it. The refusal on the part of the Insurance Commissioner to grant authority to plaintiff to transact business, after the old permit had expired does not raise a Federal question. Since the writ of error was filed the permit has ceased to have any effect, and, therefore, an event has occurred which renders it impossible for this court to grant any effectual relief in favor of plaintiff in error. In such case the court will dismiss the writ of error. (*Mills* v. *Green*, 159 U. S. 651; *Tennessee* v. *Condon*, 189 Id. 64; *Jones* v. *Montague*, 194 Id. 147.)

It would seem to be plain that the cancellation of a revocation of a permit, when the permit itself has become of no effect by virtue of the lapse of time, would be useless business, and would give no practical relief to the company.

Writ dismissed.

No. 184.

The Travelers Insurance Company, of Hartford, Connecticut, Plaintiff in Error, *vs.* Henry R. Prewitt, Insurance Commissioner of the State of Kentucky.	In error to the Court of Appeals of the State of Kentucky.

This case involves the same principle as that decided in the foregoing case, and, for the reasons stated in the opinion above, the writ of error to the Court of Appeals of the State of Kentucky is

Dismissed.



Supreme Court of the United States.

Nos. 178 and 184.—October Term, 1905.

Security Mutual Life Insurance Company, Plaintiff in Error, 178 vs. Henry E. Prewitt, Insurance Commissioner of the State of Kentucky.	In error to the Court of Appeals of the State of Kentucky.
The Travelers Insurance Company of Hartford, Connecticut, Plaintiff in Error, 184 vs. Henry E. Prewitt, Insurance Commissioner of the State of Kentucky.	

[May 14, 1906.]

Mr. Justice Peckham delivered the opinion of the Court.

Motions for rehearing have been presented by plaintiffs in error. The cases were commenced in the proper State court in Kentucky, and were argued here on their merits in January of this term, and the writs of error were dismissed, (200 U. S. 446,) because, as appeared from the record, only abstract questions remained to be decided, the licenses to do business within the State of Kentucky in both cases, which had been granted on July 1, 1904, for one year, having expired since issuing the writs of error.

In No. 178 the petition stated that the permission or authority to continue to do business in Kentucky had been renewed and extended from year to year by the State Insurance Commissioner, and that he had, on July 1, 1904, "continued the authority to the Security Mutual to transact the business of life insurance," as evidenced by the permit "for a period of one year from July 1st, 1904." It was also averred that the permit had been revoked in September, 1904, and the company asked to have the revocation cancelled.

In No. 184 the petition stated that the company had been granted authority to transact business in the State of Kentucky for the period of one year then next ensuing, that is, from July 1, 1904. The petition showed that the permit had not then (October, 1904) been revoked, but it was alleged that the Superintendent of Insurance threatened to revoke it, (on grounds substantially similar to those set forth in the Security case, in 200 U. S. *supra*, viz., the removal to a Federal court of a case commenced

against the company in the State court,) and an injunction was asked to prevent the revocation of the permit on that account.

On these motions for a rehearing it is now shown, what did not appear in the records, that the permits in fact had been renewed for another year, from July 1, 1905, to July 1, 1906, for the purpose, as it would seem, of having the point involved reviewed by this court. Neither party adverted to this fact on the argument, and the cases were fully presented by counsel on both sides, on the merits, and the question treated as still existing.

As the dismissal was ordered on a mistaken assumption of fact, justified by the records, that the permits had expired by lapse of time and had not been renewed, the applications for rehearing are granted and the judgments of dismissal set aside, and the cases will be decided upon the arguments already made in full by counsel for both parties.

The facts upon the main question sufficiently appear in the report in 200 U. S. 446. The Court of Appeals of Kentucky held the statute valid. (26 Ky. Law Rep. 1239, dissenting opinion, 27 Id. 77.) See also 83 S. W. 611; 84 Id. 527.

The matter to be now determined is whether a State has the right to provide that if a foreign insurance company shall remove a case to the Federal court, which has been commenced in a State court, the license of such company to do business within the State shall be thereupon revoked.

The statute under which the question arises is known as section 631 of the Kentucky statutes, and reads as follows:

"Before authority is granted to any foreign insurance company to do business in the State, it must file with the Commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Commissioner of Insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the Commissioner to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in this State."

A State has the right to prohibit a foreign corporation from doing business within its borders, unless such prohibition is so conditioned as to violate some provision of the Federal Constitution. Among the later authorities on that proposition are *Hooper* v. *California*, (155 U. S. 648;) *Allgeyer* v. *Louisiana*, (165 Id. 578–583;) *Orient Insurance Company* v. *Daggs*, (172

Id. 557;) *Waters-Pierce Oil Co.* v. *Texas*, (177 Id. 28;) *New York Life Insurance Company* v. *Cravens*, (178 Id. 389–395;) *Hancock Mutual Life Insurance Company* v. *Warren*, (181 Id. 73.)

Having the power to prevent a foreign insurance company from doing business at all within the State, we think the State can enact a statute such as is above set forth.

The question is, in our opinion, settled by the decisions of this court. In *Insurance Company* v. *Morse*, (20 Wall. 445,) a statute of Wisconsin, passed in 1870, in relation to fire insurance companies, after providing for certain conditions upon which the foreign company might do business within the State, continued:

"Any such company desiring to transact any such business as aforesaid by any agent or agents in this State shall first appoint an attorney in this State, on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States Circuit Court or Federal courts, and file in the office of the secretary of state a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted."

While that statute was in force the Home Insurance Company of the State of New York established an agency in Wisconsin, and, in compliance with the provisions of the statute, the company duly filed in the office of the secretary of state of Wisconsin the appointment of one Durand as their agent, upon whom process might be served. The power of attorney was filed, containing the following agreement: "Said company agrees that suits commenced in the State courts of Wisconsin shall not be removed by the acts of said company into the United States Circuit or Federal courts."

After doing business in the State for some time the company issued a policy to Morse, and a loss having occurred, Morse sued the company in one of the State courts of Wisconsin to recover the amount alleged to be due on the policy. The company entered its appearance in the suit and filed its petition to remove the case, which petition was in proper form, and was accompanied by the required bond and bail. Being presented to the State court of Wisconsin, in which the suit was brought, that court held that the statute justified the denial of the petition to remove the case into the Federal court, and a trial having been had in the State court, it gave judgment for the plaintiff on a verdict found in his favor. Upon a review of the judgment by the Supreme Court of Wisconsin it was affirmed. Thereupon the insurance company sued out a writ of error from this court, and the sole question was, whether the statute and agreement were sufficient to justify the State court in refusing to permit the removal of the case to the Federal court, and proceeding to judgment therein? This court held that the agreement was void, inasmuch as, if carried out, it would oust the

Federal courts of a jurisdiction given them by the Constitution and statutes of the United States. It was said that the statute of Wisconsion was an obstruction to the right of removal provided for by the Constitution of the United States and the laws made in pursuance thereof, and that the agreement of the insurance company derived no support from the unconstitutional statute, and it was void as it would have been had no such statute been passed. The Chief Justice, with whom concurred Mr. Justice Davis, dissented, holding that, as the State had the right to exclude foreign insurance companies from the transaction of business within its jurisdiction, it had the right to impose conditions upon their admission, which was a necessary consequence from the right to exclude altogether.

It will be seen the statute provided that in the power of attorney, appointing an agent for the company within the State, there should be an agreement that the company would not remove a case to a Federal court, and the statute was held to be void.

Subsequently the case of *Doyle* v. *Continental Insurance Company*, (94 U. S. 535,) involving the same statute, came before this court. In that case the court reaffirmed the decision of the Morse case, *supra*, as to the invalidity of the agreement. But in distinguishing the two cases it was said in the course of the opinion that, as the State had the right to entirely exclude such company from doing business in the State, the means by which it caused such exclusion or the motives of its action were not the subject of judicial inquiry; that the conclusion reached in the Morse case that the statute of Wisconsin was illegal was to be understood as spoken of the provision of the statute then under review, viz., that portion thereof requiring a stipulation against transferring cases to the courts of the United States; that the decision was upon that portion of the statute only, and that other portions thereof, when presented, must be judged on their merits. The court further said that the Morse case had not undertaken to decide what the powers of the State of Wisconsin were in revoking a license previously granted, as no such question had arisen upon the facts therein, and was neither argued by counsel nor referred to in the opinion, but that in the case then before the court (that of Doyle) the point as to the power of the State to revoke a license was distinctly presented. It is stated in the opinion, as follows:

"We have not decided that the State of Wisconsin had not the power to impose terms and conditions as preliminary to the right of an insurance company to appoint agents, keep offices, and issue policies in that State. On the contrary, the case of *Paul* v. *Virginia*, (8 Wall. 168,) where it is held that such conditions may be imposed, was cited with approval in *Insurance Company* v. *Morse*."

The opinion concludes as follows:

"It is said that we thus indirectly sanction what we condemn when presented directly; to wit, that we enable the State of Wisconsin to en-

force an agreement to abstain from Federal courts. This is an 'inexact statement.' The effect of our decision in this respect is that the State may compel the foreign company to abstain from the Federal courts, or to cease to do business in the State. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that State; that State has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and, without reference to the injustice, the prejudice, or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or Constitution of the United States, by its exclusion from the State, is infringed; and this is what the State now accomplishes. There is nothing, therefore, that will justify the interference of this court."

In these two cases this court decided that any agreement made by a foreign insurance company not to remove a cause to the Federal court was void, whether made pursuant to a statute of the State providing for such agreement, or in the absence of such statute; but that the State, having power to exclude altogether a foreign insurance company from doing business within the State, had power to enact a statute which, in addition to providing for the agreement mentioned, also provided that if the company did remove a case from the State to a Federal court, its right to do business within the State should cease, and its permit should be revoked. It was held there was a distinction between the two propositions, and one might be held void and the other not.

The case of *Barron* v. *Burnside*, (121 U.S. 186,) has been cited as overruling the Doyle case, and as holding that a statute of the nature of the one in question here is void as a violation of the Federal Constitution. In that case a statute of Iowa was under consideration. It is set out in the report. The first section provides for an application by the foreign company to the secretary of state, requesting that a permit may be issued to the corporation to transact business in the State. It also provides that the application shall contain a stipulation that the permit shall be subject to each of the provisions of the act. The third section provides that if any cases commenced in a State court were removed by the corporation into a Federal court, the corporation should thereupon forfeit any permit issued or authority granted to it to transact business in the State. The fourth section provides for punishing the agents, officers or servants of the corporation for doing business as such in the State, if the corporation had not complied with the statute and taken out and retained a valid permit to do business within the State. The corporation had not, in fact, taken out a permit. Barron, the plaintiff in error, was a servant of the corporation, and was engaged as engineer in running a train of the corporation, which started from Chicago and was running in the State of Iowa. He was arrested in Iowa for acting as the agent of the company in that State, while the company had no permit. Having been arrested, he applied to the

Supreme Court of the State for a writ of *habeas corpus*, which was issued and a return made, and the case heard upon an agreed statement, containing the above facts. The State court upheld the validity of the statute, and the case was brought to this court by writ of error, where the judgment was reversed and the statute held invalid.

In the opinion delivered in this court it will be observed that the agreement or stipulation provided for in the statute was the material fact upon which the court proceeded, and it was held that the statute did require such agreement. The various requirements mentioned in the first section of the statute were referred to as forming in fact but one proceeding and as indissolubly bound up with the application for a permit that could not be issued, unless the stipulation was given which made the permit specially subject to each of the provisions of the act, including the provision not to remove. It is clear from the whole case that the stipulation not to remove was regarded as the material part, and the case was decided on that foundation. Mr. Justice Blatchford said:

"The statute is not separable into parts. An affirmative provision requiring the filing by a foreign corporation, with the secretary of state, of a copy of its articles of incorporation, and of an authority for the service of process upon a designated officer or agent in the State, might not be an unreasonable or objectionable requirement, if standing alone; but the manner in which, in this statute, the provisions on those subjects are coupled with the application for the permit, and with the stipulation referred to, shows that the real and only object of the statute and its substantial provision is the requirement of the stipulation not to remove the suit into the Federal court."

For this reason the statute was held void.

Reference is then made in the opinion to the Morse case, (20 Wall. *supra*,) wherein it was stated that agreements in advance to oust the court of a jurisdiction conferred by law were illegal and void, and that parties could not bind themselves in advance by such an agreement thus to forfeit their rights at all times and on all occasions, whenever the case might be presented.

The Doyle case, (94 U. S. *supra*,) was also referred to, and Mr. Justice Blatchford said in regard to it as follows:

"The point of the decision seems to have been, that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in *Insurance Co.* v. *Morse*, must be regarded as not in judgment."

This is the language which it is contended overrules the Doyle case. We do not think so. A reference to the Doyle case will show that the first part of the above-quoted statement is inaccurate, as the case does not seem

to have been decided upon the proposition that an injunction was improper from a court of the United States to State officers. The Morse case was referred to and approved, and the court held there was nothing inconsistent between the two cases. The Doyle opinion proceeds upon that theory.

If it had been the intention of the court in *Barron* v. *Burnside* to overrule the Doyle case, it was easy to have said so. Instead of that, the opinion rests upon the ground of the agreement to be exacted as a condition of granting the permit, and that the statute was not separable into parts, and it was held that the requirement of such a stipulation was void. It was not held that such a statute as the one of Kentucky now under consideration was void. Such statute exacts no agreement or stipulation in any form or in any part of the statute.

In *Southern Pacific Co.* v. *Denton*, (146 U. S. 202, 207,) the same principle was stated, although the question was not directly involved, as the case was brought in the Federal court and the corporation contended it was not served with process in the proper district and that the court was on that account without jurisdiction. The court, per Mr. Justice Gray, in the course of the opinion, remarked that a statute requiring the corporation *as a condition precedent* to obtaining a permit to do business within the State, to surrender a right and privilege secured by the Federal Constitution and laws, was unconstitutional and void. (Page 207.) It was the same, in substance, as the Iowa statute, which was held void on account of the exaction of the agreement.

In *Barrow Steamship Co.* v. *Kane*, (170 U. S. 100,) Justice Gray, in delivering the opinion of the court, again stated what was regarded as the holding in the two cases of *Insurance Co.* v. *Morse* and *Barron* v. *Burnside*, and said that "statutes requiring foreign corporations, as a condition of being permitted to do business within the State, to stipulate not to remove into the courts of the United States suits brought against them in the courts of the State, have been adjudged to be unconstitutional and void." It was the exaction of a stipulation or agreement that rendered the statute illegal.

It is also said in *Blake* v. *McClung*, (172 U. S. 239, 255,) that a statute providing that a stipulation should be made that the company would not remove a case into a Federal court was void because it made the right to do business under the license or permit depend upon the surrender by the corporation of a privilege secured to it by the Constitution.

It is urged that the Iowa and Texas statutes do not require an agreement not to remove. But those statutes do require such agreement. The Iowa statute provided that the application for a permit should contain a stipulation that the permit should be subject to each of the provisions of the act, among which was one that the corporation should forfeit the permit if it should remove the case. This was held to be, in effect, a stipulation not to re-

move, exacted as a condition for granting the permit. And so the court said:

"As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void." (*Barron* v. *Burnside, supra*, page 200.)

In other words, the statate was regarded as exacting an agreement in advance not to remove a case, and such being the fact it was held that the statute was void. The Texas statute is to the same effect as that of Iowa.

The most that can be contended for is that the Barron case holds that where the statute exacts a stipulation in advance, as a condition of granting a permit, and the statute is not separable into parts, the whole statute is void, and a provision for withdrawing the permit, if a case is removed, is not saved. That principle, as we have said, does not touch this case, as there is no exaction of a stipulation at any time.

It has not been decided that a statute which has no requirement for a stipulation or agreement not to remove is void, if there be simply a provision therein for a revocation of the permit, such as is contained in the statute under review.

As a State has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial.

Counsel for the companies, in their brief admit that the State "has the right at any time to pass a statute expelling a company or revoking its license, and the validity of the statute of expulsion would not be affected by the motives of the State in so doing—even though the preamble expressly recited that the license was revoked because the company had removed a case. The statute would be valid—for the company had no constitutional right to remain in the State any longer than it chose to allow; and the statute would not abridge any right of removal—for as the case had already been fully removed before the statute was in existence, the right of removal could not be said to have been hindered or abridged by a statute not even in existence."

Thus it is admitted that a State has power to prevent a company from coming into its domain, and that it has power to take away its right to remain after having been permitted once to enter, and that right may be exercised from good or bad motives; but what the companies deny is the right of a State to enact in advance that if a company remove a case to a Federal court its license shall be revoked.

We think this distinction is not well founded. The truth is that the effect of the statute is simply to place foreign insurance companies upon a par with the domestic ones doing business in Kentucky. No stipulation or agreement being required as a condition for coming into the State and obtaining a permit to do business therein, the mere enactment of a statute which, in substance, says if you choose to exercise your right to remove a case into a Federal court, your right to further do business within the State shall cease and your permit shall be withdrawn, is not open to any constitutional objection. The reasoning in the Doyle case we think is good.

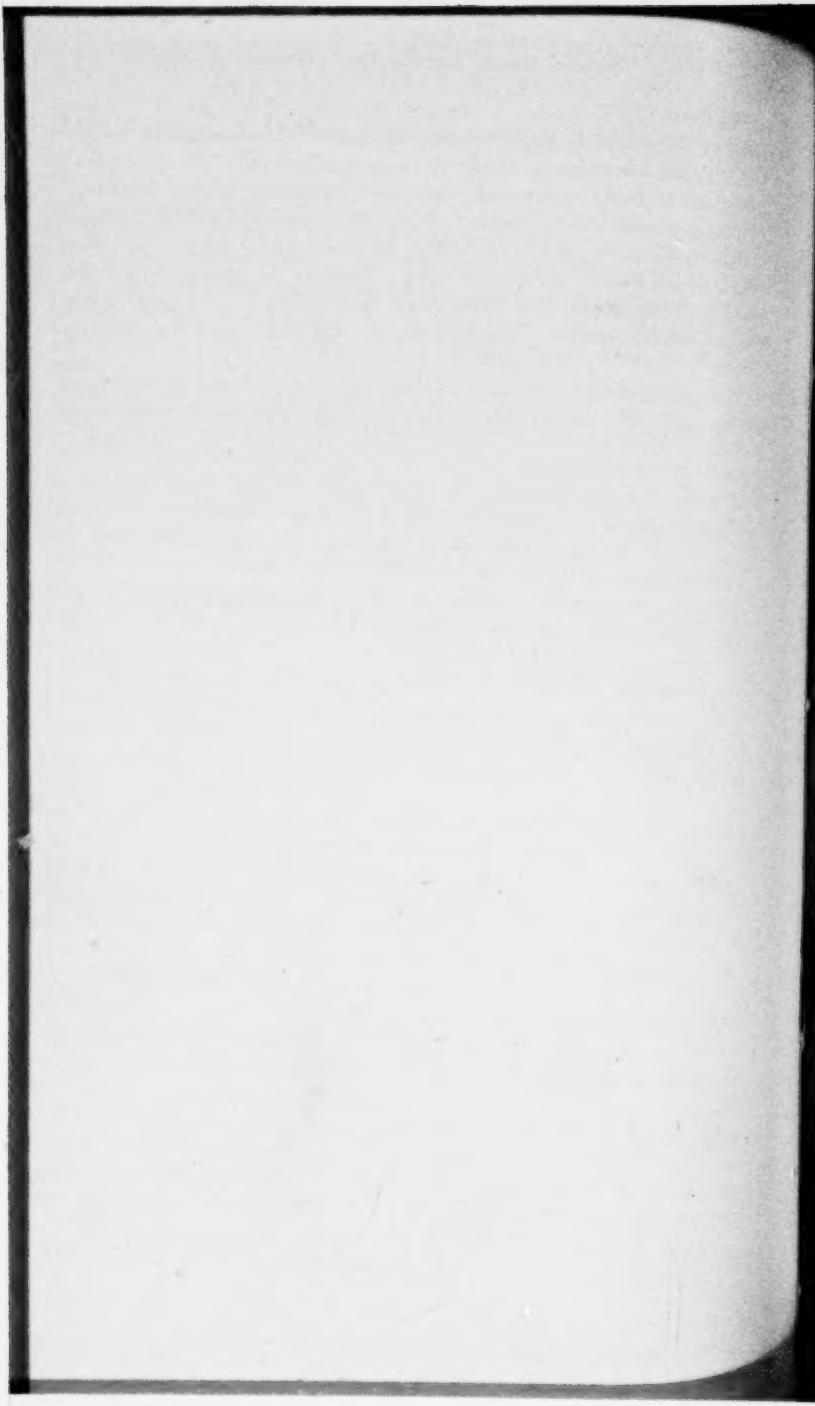
The orders heretofore entered dismissing the writs of error in these cases are set aside, and the judgments of the Court of Appeals of Kentucky are

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.



Supreme Court of the United States.

Nos. 178 and 184.—October Term, 1905.

178 Security Mutual Life Insurance Company, Plaintiff in Error, vs. Henry R. Prewitt, Insurance Commissioner of the State of Kentucky.

184 The Travelers Insurance Company of Hartford, Connecticut, Plaintiff in Error, vs. Henry R. Prewitt, Insurance Commissioner of the State of Kentucky.

In error to the Court of Appeals of the State of Kentucky.

[May 14, 1906.]

Mr. Justice Day (with whom concurs Mr. Justice Harlan) dissenting.

In view of the importance and far-reaching effect of the decision just announced, and being unable to concur therein, we have deemed it not improper to briefly state the grounds upon which our objection to the decision of the court rests.

Certain principles of constitutional law are firmly settled by the decisions of this court and need no citation of cases in their support. The Constitution of the United States and the laws passed in pursuance thereof are the supreme law of the land, and of controlling authority over all the people, and in all the States of the Union. It is equally well settled that the privilege of resorting to the Federal courts for litigation of rights in controversies between citizens of different States is created by and exercised under authority of the Constitution of the United States, which secures to citizens of another State, when sued by a citizen of a State in which the suit is brought, the absolute right to remove their cases into the Federal court upon compliance with the terms of the act of Congress enacted to effect that purpose. This principle was announced in terms in *Insurance Company* v. *Morse*, (20 Wall. 445,) has never been questioned, and is affirmed in frequent decisions of this court. No State regulation in hostility to this principle can be recognized without endangering the supremacy of the National Constitution.

The Kentucky statute imposes but a single condition necessary to be now considered upon the right of foreign corporations to do business in that State. It says in effect to a company not yet licensed to transact business within its borders, there is no objection to the company transacting business

in this State; on the other hand, it is desirable that it shall do so, subject to the condition that the company cease to do business in the State and its license be revoked the moment it attempts to avail itself of its constitutional right to remove a controversy into the Federal court under the terms of the Federal statute passed to make the constitutional right effectual. From that time its further right to do business shall cease and determine and its license be revoked. To companies lawfully within the State, as are the appellants in these cases, it makes the like proposition: You may carry on your business, having complied with other conditions, but the moment you undertake to exercise the constitutional right of removal to a Federal court your license shall be revoked, and all authority to do business in the State shall cease. That this can be constitutionally done is affirmed in the decision of the court in these cases, because of the principle that the State, having the right to exclude foreign corporations from its borders, may do so for any reason, although such action, as in the present case, is based solely upon the denial of the right of removal in proper cases by a non-resident citizen, of cases coming within the act of Congress, to the Federal courts.

As a general proposition it is undoubtedly true that a State may prevent foreign corporations, at least those not engaged in interstate commerce, from doing business within its borders and may impose restrictions upon the right to transact local business as it may see fit. But this right in our opinion is not without limitation. It is the established doctrine of this court that a restriction of this power is found in the denial of the right to a State to impose a condition in direct conflict with the Constitution of the United States, in requiring a corporation, as a sole condition of doing business within the State, to surrender the right of removal created and enforced by the Federal Constitution and laws in advance, or give it up after its admission to do business in the State.

The question came directly before this court in the case of *Insurance Company* v. *Morse*, (20 Wall. 445,) in which it was held that a State might not require a foreign corporation, as a condition of doing business within its borders, to file an agreement that such company would not remove the suit for trial into a United States Circuit Court or other Federal court. The act was held to be repugnant to the Constitution of the United States and the laws passed in pursuance thereof, as it denied the right of removal secured to the citizens of another State by the Constitution and laws of the United States. The question arose again in the case of *Doyle* v. *Continental Insurance Co.*, (94 U. S. 535.) In that case it was held by the majority of the court, Mr. Justice Bradley, Mr. Justice Miller and Mr. Justice Swayne dissenting, that the State of Wisconsin might lawfully enact a statute providing that if any foreign insurance company should transfer a suit brought in the State to a Federal court its license to do business would

be cancelled and revoked, and the doctrine was laid down that as a State had the right to exclude the company for any reason, the means by which it should cause such exclusion or the motives of her action were not the subjects of judicial inquiry. Thus the decisions of this court stood until the case of *Barron* v. *Burnside*, (121 U. S. 186,) was brought to its attention, in which it was held that a statute of Iowa, requiring a foreign corporation, as a condition of doing business in the State, to stipulate that it would not remove cases into the Federal court, which it had the right under the laws of the United States to remove, was void. And the case of *Home Insurance Co.* v. *Morse, supra*, was approved, and *Doyle* v. *Continental Insurance Co., supra*, qualified and explained. In this case Mr. Justice Blatchford delivered the unanimous opinion of the court. It is apparent from its perusal that the principle stated in *Insurance Co.* v. *Morse* and in the dissenting opinion in the Doyle case was recognized and affirmed, and the unqualified right of exclusion denied. After showing that the right to remove was the creation of the Federal Constitution and laws and could not be impaired without deprivation of a Federal right, the ground of the decision was stated to be:

"As the Iowa statute makes the right to a permit depend upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void."

And further, in speaking of the Doyle case:

"The point of the decision seems to have been that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in *Insurance Co.* v. *Morse*, must be regarded as not in judgment."

And that the court did not regard the right of a corporation in that respect as differing from that of an individual is shown in the observation:

"Its right, equally with any individual citizen, to remove into the Federal court, under the laws of the United States, such suits as are mentioned in the third section of the Iowa statute, is too firmly established by the decisions of this court to be questioned at this day; and the State of Iowa might as well pass a statute to deprive an individual citizen of another State of his right to remove suits."

In concluding the decision the court said:

"In all the cases in which this court has considered the subject of the granting by a State to a foreign corporation of its consent to the transaction of business in the State, it has uniformly asserted that no conditions can be imposed by the State which are repugnant to the Constitution and laws of the United States. (*La Fayette Ins. Co.* v. *French*, 18 How. 404, 407; *Ducat* v. *Chicago*, 10 Wall. 410, 415; *Insurance Co.* v. *Morse*, 20 Wall. 445 456; *St. Clair* v. *Cox*, 106 U. S. 350, 356; *Phila. Fire Ass'n* v. *New York*, 119 U. S. 110, 120.)"

It is thus apparent that the decision was made to turn, not upon the question of whether the agreement not to remove had been required in advance, or imposed as a condition of remaining in the State after entry therein, but rested upon the doctrine that, conceding the right of the State to exclude foreign corporations, its right to do business within the State could not be conditioned upon the surrender of a privilege secured to it by the Constitution and laws of the United States, and that the right to remove given to a foreign citizen or corporation was a right thus secured. The doctrine of *Barron* v. *Burnside* is in our judgment decisive of the contention made in the present case. If it be true, as specifically declared in that case, that the right to exclude a foreign corporation could not be made to depend solely upon the surrender by the foreign corporation of this constitutional right and privilege, it irresistibly follows that its application is fatal to the constitutionality of the statute here in question. The right of the insurance company under the present statute to do business within the State of Kentucky turns upon its willingness to surrender this privilege. If it will do so, it may continue to do business with the State; if it will not, its license will be revoked and its right to do local business destroyed. In short, it may continue to do business within the State, if it will consent to the surrender of a Federal right. We think this brings the case squarely within the limitations of the right of the State to exclude foreign corporations from its midst, and, to sustain the statute, permits a State, because of the exercise of a constitutional right, to close its gates to corporations equally entitled with private citizens in this respect to the protection given by the Constitution. The doctrine that the surrender of rights granted or secured by the Constitution of the United States may be made a condition of the privilege of doing or continuing business within a State is at war with that instrument, and if adopted or sanctioned by all the States would nullify the supreme law of the land in some of its most essential provisions.

An examination of the decisions subsequent to *Barron* v. *Burnside*, *supra*, is convincing to the effect that it has been accepted by the courts, National and State, as decisive of the proposition therein announced, that a State statute giving the right to do business or to terminate a business already instituted, upon the sole condition of the surrender of a Federal right, secured by the Constitution, is void and of no effect. The case, thus interpreted, has been cited and followed in subsequent cases in this and other Federal courts.

In *Southern Pacific Co.* v. *Denton*, (146 U. S. 202, 207,) Mr. Justice Gray, delivering the unanimous judgment of this court and referring to a statute of Texas similar to the one now under consideration, said: "That statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege

secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions," citing *Insurance Company* v. *Morse* and *Barron* v. *Burnside*. The same eminent judge, delivering again the unanimous judgment of this court in *Martin* v. *Baltimore & Ohio Railroad*, (151 U. S. 673, 684,) and again citing the *Morse* and *Barron* cases, said: "The Baltimore and Ohio Railroad Company, not being a corporation of West Virginia, but only a corporation of Maryland, licensed by West Virginia to act as such within its territory, and liable to be sued in its courts, had the right, under the Constitution and laws of the United States, when so sued by a citizen of this State, to remove the suit into the Circuit Court of the United States, and could not have been deprived of that right by any provision in the statutes of the State." Again, upon the authority of the same cases, including the Denton case, this court, by its unanimous judgment in *Barrow Steamship Co.* v. *Kane*, (100 U. S. 100, 111,) said: "So statutes requiring foreign corporations, as a condition of being permitted to do business within the State, to stipulate not to remove into the courts of the United States suits brought against them in the courts of the State, have been adjudged to be unconstitutional and void." To the same effect was the case of *Blake* v. *McClung*, (172 U. S. 239, 255–6,) in which it was said, upon the authority of the *Morse*, *Barron* and *Denton* cases: "It was accordingly adjudged in *Barron* v. *Burnside*, (121 U. S. 186, 200,) that an Iowa statute requiring every foreign corporation named in it, as a condition of obtaining a license or permit to transact business in that State, to stipulate that it would not remove into the Federal courts suits that were removable from the State courts under the laws of the United States, was void because it made the right to do business under a license or permit dependent upon the surrender by the corporation of a privilege secured to it by the Constitution. . . . So statutes requiring foreign corporations, as a condition of being permitted to do business within the State, to stipulate not to remove into the courts of the United States suits brought against them in the courts of the State, have been adjudged to be unconstitutional and void." In *Chattanooga, R. & C. R. Co.* v. *Evans*, (66 Fed. Rep. 809, 814,) heard before Judges Taft, Lurton and Severens, the Circuit Court of Appeals for the Sixth Circuit, speaking by Judge Lurton and referring to the Morse and Barron cases, recognized the right of the State to prescribe terms upon which a corporation of another State or country may carry on business within its borders, but taking care at the same time to say: "That there are limitations upon this power is equally well settled, for it cannot impose as a condition that such nonresident corporation shall not resort to the courts of the United States."

In *Bigelow* v. *Nickerson*, (70 Fed. Rep. *supra*,) Judge Jenkins, speaking for the Circuit Court of Appeals, Seventh Circuit, after reviewing the cases in this court, said:

"We consider the question foreclosed and no longer open to discussion. No condition imposed upon a right granted by a State, which prevents one from availing himself of his constitutional prerogative of appeal to the courts of the United States can be upheld."

In *Reimers* v. *Seatco Man. Co.*, (70 Fed. Rep. *supra*,) Judge Taft, speaking for the Circuit Court of Appeals, Sixth Circuit, said:

"The right of a State to impose conditions upon foreign corporations doing business therein is not unlimited. In *Insurance Co.* v. *French*, (18 How. 404,) Mr. Justice Curtis, speaking for the Supreme Court, said:

"'A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. (*Bank* v. *Earle*, 13 Pet. 519.) This consent may be accompanied by such conditions as Ohio may think fit to impose, and these conditions must be deemed valid and effectual by other States and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense.'

"In *Southern Pacific Co.* v. *Denton*, (146 U. S. 202, 13 Sup. Ct. 44,) it was held that the law which permitted a non-resident corporation to do business within its territory on condition that it should forfeit such permit if it removed a suit brought against it into the court of the United States held within the State, was unconstitutional and void, and could give no validity and effect to any agreement or action of the corporation in obedience to its provisions, because it thereby was compelled to surrender a right and privilege secured to it by the Constitution and laws of the United States; citing *Insurance Co.* v. *Morse*, (20 Wall. 445,) and *Barron* v. *Burnside*, (121 U. S. 186, 7 Sup. Ct. 931.)"

Notwithstanding these cases, it is now adjudged that so far as the Constitution of the United States is concerned, it is competent for any State to withdraw or cancel a license given to a corporation of another State to do business within its limits whenever and solely because that corporation, being sued in a State court, has the case removed to the Federal court for trial or hearing. If each State should enact a statute, such as the one before us, the right secured to a corporation when sued in the courts of a State other than the one creating it, to invoke the jurisdiction of the Federal court, would be abrogated throughout the whole United States, although such right is secured by the Constitution and by valid acts of Congress. We cannot assent to this view. It amounts to a practical nullification in respect to such corporations of the supreme law of the land and places important constitutional rights at the mercy of the several States.

In the State from which this case comes, after a full review of the decisions of this court, the same conclusion was reached in *Commonwealth* v. *East Tenn. Coal Co.*, (97 Ky. 238.)

The same view of the effect of *Barron* v. *Burnside* has been accepted by the text writers. (2 Cook on Corporations, 3d ed. 1675; Moon, Removal of Causes, [1901,] §§ 30 and 31, and notes in which the author expresses the view that the Doyle case has become obsolete and is practically overruled by *Barron* v. *Burnside* and subsequent cases in this court, § 30, note 3; Curtis' Jurisdiction of the United States Courts, 2d ed. by Merwin, 187.)

The principles announced in *Doyle* v. *Ins, Co.* and *Barron* v. *Burnside* are directly opposed the one to the other, and cannot both prevail. The former case was decided upon the principle that as the State has the full right to exclude a foreign corporation it may do so for any reason or for no reason. The latter case qualified this doctrine with the limitation that the exclusion may not be solely because the corporation was exercising or would not yield the right to avail itself of a privilege created and protected by the Federal Constitution.

After such repeated affirmance and general acceptance, we do not think the doctrine announced in *Barron* v. *Burnside* ought to be qualified or detracted from, and certainly it seems to us that the court should not return to the rejected doctrine of the Doyle case.

If a State may lawfully withhold the right of transacting business within its borders or exclude foreign corporations from the State upon the condition that they shall surrender a constitutional right given in the privilege of the companies to appeal to the courts of the United States, there is nothing to prevent the State from applying the same doctrine to any other constitutional right, which, though differing in character, has no higher or better protection in the Constitution than the one under consideration. If the State may make the right to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. In pursuance of the principle announced in this case, that the right of the State to exclude includes the right, when exercised for any reason or for no reason, the State may say to the foreign corporation,—You may do business within this State, provided you will yield all right to be protected against deprivation of property without due process of law; or provided you surrender your right to have compensation for your property when taken for private use, or provided you surrender all right to the equal protection of laws; and so on through the category of rights secured by the Constitution and deemed essential to the protection of people and corporations living under our institutions. This dangerous doctrine, asserted in the majority opinion in the Doyle case, destroyed and overthrown as we think in *Barron* v. *Burnside*, which latter case has been consistently and repeatedly followed in this court and in other courts, Federal and State, from that day to this, ought not now to be rehabilitated and restored to its power to work destruction of rights deemed so essential to the safety of citizens, natural and arti-

ficial, that they have been secured by the provisions of the Federal Constitution.

In the opinion of the court in this case the doctrine that a corporation cannot be permitted to be deprived of its right to do business because of the assertion of a Federal right is said not to be denied, because the right of a foreign corporation to do business in a State is not secured or guaranteed by the Federal Constitution. Conceding the soundness of this general proposition, it by no means follows that a foreign corporation may be excluded solely because it exercises a right secured by the Federal Constitution. For, conceding the right of a State to exclude foreign corporations, we must not overlook the limitation upon that right, now equally well settled in the jurisprudence of this court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution. If this were otherwise, the State would be permitted to destroy a right created and protected by the Federal Constitution under the guise of exercising a privilege belonging to the State, and, as we have pointed out, the State might thus deprive every foreign corporation of the right to do business within its borders, except upon the condition that it strip itself of the protection given it by the Federal Constitution. Furthermore, it is stated in the prevailing opinion that while the State may exclude in advance or deprive a foreign corporation of the privilege of doing business after it is lawfully in the State, because of the exercise of a Federal right, it cannot require the corporation to agree in advance that it will waive such right, as that, it is admitted, would be unconstitutional.

We think the distinction is without a substantial difference and makes the validity of the act turn upon the means of attaining the same unlawful end. In either alternative the corporation is excluded from the State because it will not consent to surrender the right given it under the Federal Constitution. While we concede the right of a State to exclude foreign corporations from doing business within its borders for reasons not destructive of Federal rights, we deny that the right can be made to depend upon the surrender of the protection of the Federal Constitution, which secures to alien citizens the right to resort to the courts of the United States.

In the cases decided in this court subsequently to *Barron* v. *Burnside*, while the general proposition is affirmed that a State may prescribe conditions upon which a foreign corporation may do business within its borders, in no one of them is it asserted that the State may exclude or expel such corporations because they insist upon the exercise of a right created by the Federal Constitution. On the contrary, this court has repeatedly said that such right of exclusion was qualified by the superior right of all citizens to enjoy the protection of the Federal Constitu-

tion. The Federal authority gives no right to deny to the citizens of a State access to the local courts of a State. For wise purposes the Federal Constitution has provided courts for citizens of different States, believed to be free from local influence and prejudice, and laws have been passed by Congress to make the privilege of resort to them effectual. In our view no State enactment can lawfully abridge this right or destroy it, directly or indirectly by affixing heavy pealties to its assertion by those lawfully entitled to its enjoyment. We think *Barron* v. *Burnside* was intended to overrule the contrary declaration which is found only in the Doyle case, which is inconsistent with or opposed to every other declaration directly upon the subject in the opinions of this court.

We are of opinion that the statute in question, so far as it authorizes the cancellation of a license given by a State to a corporation to do business within its limits, whenever such corporation, in the exercise of a constitutional right, has a suit brought against it in a State court removed to the Federal court for trial, is unconstitutional and void.

For the reasons stated we are constrained to dissent.

True copy.

Test:

Clerk Supreme Court, U. S.